Supreme Court, U.S.
FILED

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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

A. PAUL SCHWENKE,
Petitioner,

vs.

UTAH STATE BAR,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UTAH SUPREME COURT.

PETITION FOR A WRIT OF CERTIORARI

A. PAUL SCHWENKE, Pro Se
Counsel of Record
10 West Broadway, #311-B
Salt Lake City, UT. 84101
Telephone: (801) 359-0600
Telefax: (801) 359-1859

Petitioner

VOLUME TWO

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APPENDIX Av-1- to Av-4-

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BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the matter of the Complaint by
CAREN SERR
against

SUMMONS

F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

THE UTAH STATE BAR TO: A. Paul Schwenke

You are hereby cited to appear and file an Answer in writing within twenty days after service of this Summons upon you, asserting your defense to the Complaint in the above entitled action, a copy of which is attached and served herewith. If the service of the Summons and attached Complaint is by mail, you actually have twenty-three (23) days from the date of the mailing of the Summons and Complaint to have your Answer postmarked or personally filed with John C. Baldwin at the Bar Office.

If you fail to answer within the time fixed by this Summons, the Commission will enter your default, deem the allegations admitted, and proceed to fix the time and date for a hearing to receive evidence and argument with respect to the discipline, if any, to be imposed or recommended.

DATED this 4 day of December, 1990.

Stephen en A. Trost Bar Counsel	Dale Kimbal , Chair Ethics and Discipline Committee

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In the matter of
the Complaint by
CAREN SERR
against

FORMAL COMPLAINT

F-322

A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83

COMES NOW the Ethics and Discipline Committee of the Utah State Bar, by and

through Stephen A. Trost, Bar Counsel, and complains against Respondent as follows:

I

(Parties)

The attorney charged with unprofessional conduct in this complaint is A. Paul Schwenke, who is an Attorney and Counselor in the State of Utah, and a member of the Utah State Bar, residing in Salt Lake City, Salt Lake County, State of Utah, and whose address according to the records of the Executive Director of the Utah State Bar, is 165 South West Temple, Suite 300, Salt Lake City, Utah 84111.

II

(Jurisdiction)

1. This complaint is filed with the Board of Commissioners of the Utah State Bar by the undersigned as Chairman of the

regularly appointed Ethics and Discipline Committee of the Utah State Bar.

2. On or about February 19, 1988, before the Screening Panel of the Ethics and Discipline Committee of the Utah State Bar, a Notice of Complaint was duly served on Respondent.

3. On or about March 24, 1988, a Screening Panel of the Ethics and Discipline Committee of the Utah State Bar convened to consider this matter and at that time voted to issue a Formal Complaint.

III

(Statement of Claims)

(DR. Violations)

The unprofessional conduct charged in this complaint is alleged as follows:

4. Respondent has violated the following Rules of Professional Conduct as approved by the Utah Supreme Court on 2/19/71:

A) Canon 1, DR 1-102 MISCONDUCT

A) A Lawyer shall not:

3) Engage in illegal conduct involving moral turpitude; and/or

4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation; and/or

6) Engage in any other conduct that adversely reflects on his fitness to practice law.

B) Canon 1, DR 9-102 Preserving Identity of Funds and Property of Client:

B) A lawyer shall:

(1) promptly notify a client of the receipt of his funds, securities, or other properties and/or

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practical and/or

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of a lawyer and render appropriate accounts to his client regarding them and/or

(4) Promptly pay or delivery to the client as requested by a client, the funds, securities, or other properties in the possession of a lawyer which a client is entitled to receive.

IV

(Allegations of Facts)

The allegations of fact upon which the before mentioned disciplinary rule violations are based are as follows:

5. At all times herein the Respondent Schwenke was an attorney licensed to practice law in the State of Utah.

6. In June, 1985, the Respondent, and his associate Bruce J. Udall, entered into a contract with the Complainant, Caren Serr, to represent her in the recovery of damages for injuries she sustained in an automobile accident on November 16, 1983. The contract provided that the Respondent and his associate were entitled to an attorney fee of 28% of any recovery.

7. The subject accident involved two cars colliding at an intersection, one driven by a party named Collard and insured by Western Fire, and the other driven by a party named Whitehead and insured by Colonial Penn. Total policy limits were $200,000. It appeared that both Collard and Whitehead were at fault in the original collision and that the Complainant was without fault in that subsequent to the initial collision their vehicles struck her vehicle.

8. On September 23, 1985, Schwenke settled the Complainant's claim against Whitehead and Collard. In negotiating the settlement, advising her to accept the settlement, and collecting and disbursing

settlement proceeds the Respondent Schwenke was the lead attorney,
taking all steps and making all representations necessary to effectuate the settlement, with his associate Bruce J. Udall being more or less passive.

9. Respondent advised the Complainant that the most he could obtain for her was a $26,763.75 cash payment with which he would purchase from an insurance company an annuity that would provide her with a $250 a month payment for her life. The defendants' insurers would also pay her outstanding medical bills of $11,179.96 and her attorney fees.

10. Complainant reasonably relied on the advice given her by Schwenke and

accepted this offer and signed the settlement documents.

11. Documents submitted in the Third District Court indicate that both insurers were going to pay their entire limits, totaling $200,000 due to the severe disabling injuries incurred by the plaintiff, complainant herein, and the clarity of her liability claim against both defendants.

12. On or about September 23, 1985, Complainant endorsed a check issued by Western Fire for $27,847.88, as well as a second check also from Western Fire for an additional $13,381.88. The Respondent advised her that these checks represented the monies to purchase the annuity and to pay the balance due on her medical bills.

13. Respondent never purchased the annuity, but rather converted the funds for his own use.

14. Over the next two years, Schwenke sporadically paid Complainant from his own monies a sum of $250 a month for a total of $4,500 representing to the Complainant that he was in fact forwarding to her the insurance annuity checks.

15. The Complainant has no annuity and has been irreparably harmed thereby.

16. Complainant relied on Schwenke's statements that he would obtain the annuity when the settlement was made and that he had obtained the annuity.

17. On or about September 25, 1985, Colonial Penn delivered two checks to defendant Schwenke for the identical sums

that Western Fire issued, to wit, $27,847.88 and a separate check for $13,381.88. Schwenke failed to advise Complainant about these funds.

18. Schwenke deposited the checks into his own account in his own name and either forged or caused to have forged Complainant's signature on both checks.

19. The actual money that Complainant received from the settlement was the $4,500 paid to her under the pretense of an annuity over a two-year period, and $11,310 in cash at the time of settlement, for a total of $15,810.

20. Total cash paid by the insurers was $82,359.52. In addition, the insurers paid Complainant's medical expenses of $11,179.96; for a total benefit to

Complainant, if properly disbursed, of $93,539.48.

21. The maximum fee Respondent and his associate Udall would had been entitled to was $26,191.05.

22. Respondent Schwenke actually received $65,049.52.

23. In a Stipulation of September 19, 1989, entered in the Third District Court case of Serr vs. Schwenke and Bruce Udall, Civil No. 88-01441, Schwenke confessed to a judgment in fraud, not dischargeable in bankruptcy in the sum of $100,000, less credits for cash Respondent paid her after September 19, 1989, and the proceeds from two parcels of land, one in Weber County, Utah, and the other in Duchesne County, Utah which according to the terms of the

Stipulation were to be deeded to the Complainant.

24. Subsequent to the Stipulation, Schwenke paid $250 in cash, did not convey the Weber County property, but did convey the Duchesne County property valued at $2,500.

25. The Stipulation provided that the findings of this judgment were to state fraud with particularity for the purpose of avoiding a bankruptcy discharge of the judgment by Schwenke.

26. At the time Schwenke settled Complainant's case, he was in bankruptcy.

27. Complainant's then known medical costs, including major reconstructive surgery, was $40,000 to $60,000. By settling when he did, defendant Schwenke made

unavailable to plaintiff the money to have that surgery and, as a result, she has not had the surgery and remains disabled.

28. Schwenke timed the receipt of the settlement funds to meet his own financial needs at the expense of his client.

29. The fee Schwenke actually took is roughly equivalent to the fee he would have obtained had he obtained for plaintiff the full $200,000 settlement, the difference being that plaintiff received over $100,000 less that she would have had Schwenke given her interests priority over his own.

30. The $100,000 stipulated judgment entered by the Third District Court in Serr vs. Schwenke and Udall, was based upon fraud including clearly justified damages for the loss of the money necessary for Serr to have

the needed rehabilitative surgery, and for money converted by Respondent and paid by the insurers for the loss of her future earnings, emotional distress, punitive damages, costs and attorneys' fees.

WHEREFORE, the undersigned, on behalf of the UTAH STATE BAR, prays that proceedings be taken herein against the attorney charged pursuant to the Procedures of Discipline and the Revised Rules of Professional Conduct of the Utah State Bar, and that the Utah State Bar be awarded its costs in bringing this action and that the appropriate restitution orders be made.

DATED this 4 day of December, 1990.

_____

Dale A. Kimball, Chair
Ethics and Discipline
Committee

_____

Steph en A. Trost
Bar Counsel

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Formal Complaint and Summons was deposited in the U.S. mail postage prepaid certified mail, to A. Paul Schwenke, Attorney at Law, at 165 South West Temple, Suite 300, Salt Lake City, Utah 84111 on this 4 day of December, 1990.

_____

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of the Complaint by
CAREN SERR

DEFAULT

against

F-322

A. PAUL SCHWENKE
DOB: 12-12-51
ADM: 05-09-83

The Respondent having been regularly served with process, and having failed to appear and answer the Formal Complaint on file in the above-captioned matter, and the time allowed by the Procedures of Discipline of the Utah State Bar and the Summons for answering having expired, the default of the Respondent is hereby entered, upon the request of the Office of Bar Counsel.

DATED this 19 day of March, 1991.

JOHN C. BALDWIN
Executive Director

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing Default was mailed certified mail, postal certification number P753 115 861 to A. Paul Schwenke at 165 S. West Temple, Suite 300, SLC, UT 84101 on this 19th day of March, 1991.

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR

In The Matter of the Complaint by
CAREN SERR. DEFAULT
against

F-322

A. PAUL SCHWENKE
DOB: 12-12-51
ADM: 05-09-83

The Respondent having been regularly served with process, and having failed to appear and answer the Formal Complaint on file in the above-captioned matter, and the

time allowed by the Procedures of Discipline of the Utah State Bar and the Summons for answering having expired, the default of the Respondent is hereby entered, upon the request of the Office of Bar Counsel.

DATED this 28 day of March, 1991.

John C. Baldwin
Executive Director

CERTIFICATE OF CERTIFIED MAILING

I HEREBY CERTIFY that a true and correct copy o the foregoing Default was mailed certified mail, postal certification number P753 115 908 to A. Paul Schwenke at 165 S. West Temple, Suite 300, SLC, UT 84101 on this 25 day of March, 1991.

BEFORE THE BOARD OF COMMISSIONERS
OF THE UTAH STATE BAR
HEARING PANEL:
Robert Wallace, Chair
Richard Makeoff
Sandra Wilkins

In the Matter of the
Complaint by:

NOTICE OF HEARING

BAR COUNSEL AND RON
AND CAREN SERR

F-322 AND F-478
(CONSOLIDATED)

against
A. PAUL SCHWENKE
DOB: 10-12-51
ADM: 05-09-83
TO: A. PAUL SCHWENKE

Notice is hereby given that a hearing in the above-entitled matter will be heard Monday, March 2, 1992 at 9:00 a.m. in the Utah State Bar Offices, 645 South 200 East, Salt Lake City, Utah 84111 before the above-named hearing panel.

DATED this 6 day of December, 1991.

_____

CERTIFICATE OF MAILING

I hereby certify that a true and current copy of the foregoing Notice of Hearing, was mailed certified mail, return receipt requested, number P 753 115, 659, to A. Paul Schwenke, Attorney at Law, at P. O. 57853, Murray, Utah 84107 and certified mail, return receipt requested, number P 753 115 659 to A. Paul Schwenke, Attorney at Law 5233 Holbook Drive, Las Vegas, Nevada 89103 on this 6 day of December, 1991.

_____

STATE BAR ASSOCIATION

IN RE:

A. PAUL SCHWENKE

BE IT REMEMBERED that on the 2nd day of March ! 1992, the above-entitled matter came on for hearing before Robert Wallace, Greg Tobler and Sandra Wilkins, sitting as the hearing panel in the above-entitled matter for the purpose of this cause, and that the following proceedings were had.

A P P E A R A N C E S

For the State Bar: MR. WENDELL SMITH
Assistant Bar Counsel

MS. PAMELA BLEVINS
Paralegal

For the Respondant: MR. A. PAUL SCHWENKE

ROCK MOUNTAIN REPORTERS
322 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Phone (801) 531-0256

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P R O C E E D I N G S

MR. WALLACE: I think we're ready to proceed. I have--this is the complaint of Ron and Karyn Sur or Karyn Sur, Bar No. F-322, consolidated by order of 6 November 25th, 1991, with a second complaint, that of the Bar Council concerning primarily actions involving Stanley L. Wade.

Is that everyone's understanding?

MR. SMITH: Yeah. We have--we have two matters that have been consolidated here; we have 322 involving Karyn Sur and 478 involving Stanley Wade, yes, sir.

MR. WALLACE: Correct. F-478.

Would the parties please state their appearances?

MR.SMITH: Wendall Smith, Assistant Bar Council, and seated with me at the table is Pamela Levins, a paralegal in the Office of Bar Council.

MR. SCHWENKE: I'm Paul Schwenke, I'm the

MR. WALLACE: Respondent.

MR. SCHWENKE: Respondent

MR. WALLACE: Mr. Schwenke, do you have any objection to proceeding at this time, or any reason why we shouldn't go forward at this time?

Mr. SCHWENKE: I do have objection to these proceedings, which I would ask for--

- 02 -

MR. WALLACE: Would you like to state that for 2 the record at this time?

MR. SCHWENKE: Well, it will take some time for me to put it on the record, if it's that appropriate.

MR. WALLACE: I think now is the time to do it. We'll give you that lea~e, if you'd like to proceed at this time.

MR. SCHWENKE: All right. Thank you.

If I may--

MR. WALLACE: Well, before you proceed, let me just indicate that the panel is composed of Greg Tobler, to my left, Sandra Wilkins to my right, and myself, Robert Wallace. That should probably be a matter of record.

Go ahead, Mr. Schwenke.

MR. SCHENKE: Thank you.

If I may--might, by way of background put two facts on the record. Chronologically, as of August, 1990, the last appearance I have before the panel here on a motion for discovery, sanctions for failure to comply with discovery.

The panel, again, it's not this panel, the panel in that matter ordered my pleadings stricken and imposed a one-year suspension; this was August, 1990.

After that time, in or about September, with the impending year suspension, I start looking elsewhere for perhaps other possibilities of earning or making a living.

At this time, in August, I was subletting an office space from a Mr. James Johnson at 165 South West Temple, here in Salt Lake City,

and soon after the decision of the panel in that other case, I left that office and started to pursue some other sources of earning a living, however, when I left that office, my ex-wife stayed in the office to do bookkeeping work for Mr. James Johnson, and she stayed in that office until January, 1991, wherein--

MR. WALLACE: What is her name?

MR. SCHWENKE: Wilma Schwenke; wherein she left the State with her boyfriend and my children, to Las Vegas, Nevada.

What I was working on at the time was the possibility to develop some properties, real properties I have back in the Samoan Islands, and around December or so, I, with the Samoan Embassy in Washington, New York, there was a possibility that perhaps I could

go forward with some possibility in that respect.

So in January of 1991, I left the State. First, I went to Vegas and spent a few days with my children and then from Las Vegas, I went on to New York and Washington, D.C. to work with the embassy there, the Ambassador from Samoa to the United States on the prospect of developing these properties back in Samoa.

From--in February of 1991, the Ambassador and I

went to Samoa and we worked on this project there. We returned. I again returned back to Washington, D.C. I again left the--made three more trips to Samoa on this project; in the meantime, my residence has clearly been in Washington, D.C. working on this project.

Starting in, some time in March, 1991, Robin Moffat, who is the secretary to Mr. James Johnson, collect start collecting mails that come to the office there that are addressed to myself or to Wilma Schwenke, and when she has enough mail, she will put them all in a big envelope and send them off to Wilma, at her boyfriend's address in Las Vegas, Nevada.

Before I left for Las Vegas in January, I inquired with the Supreme Court on the

status of the order wherein I was suspended for 90 days. That was entered, or the order that was a result of a hearing in August. So, January, six months or so later, I asked the Supreme Court, and the order has not been rescinded to the Supreme Court, and I was--I wanted to file an appeal of that order, so I asked Mr. Johnson before I left, if he could keep tabs on it to make sure that when the order is entered, let me know so I can return and file an appeal on that order.

Additionally, I also asked Mr. Johnson to see if he could keep in touch with the Bar on any other proceedings that are--are proceeding here and advise me so I can properly

respond. According to Mr. Johnson--and Mr. Johnson and his secretary offered to make themselves available this morning in the event that the panel wishes to corroborate that statement, that they will be able to come here and do so. Mr. Johnson said he--he did in fact contact the Bar and advise them to contact him if any proceedings were-- or on any matter. That didn't happen.

I believe from looking at the matter, it appears like any of the notices that were supposed to be sent, that were sent to me direct, went to the office of James Johnson. And may I add that his office, the receptionist is not his receptionist, it's a shared receptionist amongst several businesses in the building, and whether the

matter or the pleadings got served on that receptionist or ended up with- I don't know how, I'm just speculating that perhaps it got to her, if in fact, there is a return of mail service or anything to that nature, I don't even know who the receptionist would have been in March or April or May or June of 1991, or July, 1991, or neither was there any express, implied authority for anybody in that receptionist desk to receive any--accept any service on my behalf. Specifically, I asked Mr. Johnson to find--to keep tabs on the Keaton matter that was on appeal, that I wanted to appeal, there has not been an appeal yet, and the order, at the time I left the State, has not been filed with the

Supreme Court. Incidentally, the order was filed in--with the Supreme Court in March, seven months after the hearing in August, and that notice of that order again fell in the wayside with all other notices that have allegedly been sent in this matter.

And secondly, I also asked Mr. Johnson on the Sur matter, which is one of the matters before the Court today, before the panel today, and also another matter, the Kafen matter; I had no idea there was a Wade matter pending; none whatsoever, and according, I did not tell Mr. Johnson to--to keep an eye out on the--a Wade matter, 'cause there was no--no--no idea that that was so.

And my advice to hi~ was simply to let me know, find--to stay on top, I didn't want to be outside of the State and--and things are happening, which unfortunately, it did happen without me here to properly defend against any of these matters.

According to Mr. Johnson, he made the contact with the Bar and--and asked to be advised of those matters; instead, it looks like the Bar continued to serve me and address matters to me and sent to Mr. Johnson's address or at least in the building that he's in.

Again, I want to emphasize, I do not know who the receptionist at that building was in March, 1991, June, 1991, or July, 1991, when the alleged service was made

on the matters before the panel this morning. Let me again go back to when I said in February, I traveled with the Ambassador to Samoa. We spent a lot of time there on this project. Then February, 1991, and October, 1991, a total of four trips was made between D.C., Washington, D.C. and--and Western Samoa.

On the--my May trip to Samoa, 1991, I had several investors from Idaho, from Florida, that traveled with me and the Ambassador to Western Samoa. While in Samoa, I--we I ran into a person from Provo, Utah, his name was Dan Wakefield. Mr. Wakefield, when he returned from Samoa in June of 1991, contacted the Bar to inquire about my person, or about what, you know, whether--if I was to be, I guess, trusted

with the project that was going on. Mr. Wake field has a different project he was trying to pursue in Samoa, a museum, Robert Lewis Stephenson museum in Samoa, and he felt that perhaps my project was going to interfere with his, and accordingly, he wanted to find out from the Bar what my status was.

When he contacted the Bar office, he was informed that, number one, I was disbarred number two, that I have stolen thousands--hundreds of thousands of dollars from clients in Utah; and number three, that I was presently a fugitive from justice. This information was then relayed to the investors that went with me to Samoa and eventually

came--got to me on around the first part of Feb--or July, I discovered that in fact there was this type of information being given out.

Also, I was concerned about this fugitive from justice matter, so I then contacted Mr. Johnson here and asked him to check with the prosecutor's office and see if there's any pending matter there against me. When Mr. Johnson contacted the prosecutor's office, he discovered that number one, the Bar office has instituted a criminal complaint against me, and that there has been a warrant for my arrest issued.

At that time, I then asked Mr. Johnson to advise the County prosecutor that I was coming in--giving a date and time that I

would be coming in to the State to surrender to the Court, and this was again, like I say, it was in the latter part of June or the first part of July of 1991.

I might mention at this point that, and I asked for the rules this morning, Rule 9, Sub (2)(3) of the rules for the proceedings before this panel, or before the Bar, clearly states that matters, if matters are pending before the Committee or the Bar has any relation to any civil or criminal matters factually similar to criminal or civil matter, that the matters before the Bar will be held in abeyance.

Contrary to the spirit of that rule, it appears

that the Bar, at the same time they instituted criminal proceedings against me, they also filed matter 478 that is before the panel this morning to proceed also against me here before the Bar Commission at the same time they have instituted criminal proceedings against me, which I believe is totally in contravention of this--of its own rules. Or at least the spirit of the rule.

It appears that in--Mr. Johnson had an agreement with the prosecutor that I will then, and this was again in July, appeared and surrender; but in or about October--September, I was in Samoa in September and again working on this project, I returned October, 1991. At this time, I was traveling with the Prime Minister from Samoa to go back to D.C., he--the Prime ~iinister

was scheduled to meet with President Bush, but also I was expecting the Prime Minister to meet with the orsanization called OPIC, Overseas Private Investment Corporation, who had the funding that was in place already for a project--for a project in Samoa, which funding is what I was hoping to then use in developing my properties in Samoa.

Interestingly, this was in October, 1991. In D.C., I was excluded from all the functions, receptions and the Prime Minister asked me to go to New York and wait for the Prime Minister in New York. In New York, the Ambassador sat me down and advised me that twice, at least twice,

Somebody from the Bar has called the Embassy in New York I mean in--in Washington D.C.,

and again advised the Embassy in D.C. that Schwenke was disbarred, Schwenke has stolen several hundred thousands of dollars from his clients in Ameri--in Salt Lake--in Utah, and that Schwenke was a fugitive from justice.

And as a consequence of all these, the Ambassador felt that the government, and he so advised the Prime Minister, should not get involved with my project. This was in October, 1991. And with the--that news, I left Washington in October, and I went to Idaho, where I have been staying. Except in December, 1991, I went to Las Vegas again to visit my children. And I acguired the Christmas tree and was in their house putting on the Christmas decorations when

the Las Vegas Police arrested me and I spent two-and-a-half days in a holding tank in Las Vegas, pursuant to this criminal matter pending here.

It turned out that the agreement between the prosecutor and Mr. Johnson just never got in to the Court and the warrant was still outstanding, and after I was released, I immediately came to the State and appeared before the Judge and surrendered to the Court, and I'm now under--the criminal prosecution has now proceeded against me and I'm here in the State for that purpose, and also for purposes of any more proceedings before the Bar, I will

remain here as long as it will take to resolve both criminal matt--any matters before the Bar. And if I may give the panel my address now, in Salt Lake City. It's 106 logic Drive, that's M-a-g-i-c, Magic Drive, Murray, 84107-8209.

MR. WALLACE: Anything else concerning that matter right now?

MR. SCHENKE: Yes, your Honor. I--I 'm not through.

MR. WALLACE: Go ahead.

MR. SCHWENKE: Okay. I think I might mention that the--the Bar certainly know what effect Of personal service entails. Before I could sit down on Friday before Judge Moffat for my arraignment, the bailiff asked me to step outside, and she served me with the pleadings on a different matter. I

believe the Bar has indicated that this is clearly how personal service would be done in--in these matters.

Secondly, this pleadings I was served with on Friday, I can honestly say to this panel, is the only pleading that has been served on me since I left the State in January Of 1991.

MR. WALLACE: What is that pleading?

MR. SCHWENKE: It's a pleading on another-- prepared in another complaint-

MR. WALLACE: Is it either one of these? All I want to ask is-

MR. SCHWENKE: No.

MR. WALLACE: --is it either one of these? F-322 or F-478?

MR. SCHWENKE: No.

MR. WALLACE: All right. Go ahead.

MR. SCHWENKE: Okay. It appears to me that due process requires or at least demand that I be personally served on the matters now before the panel. I was not.

Bar Office was aware, at least by June, 1991, that I was in Samoa for when they were contacted by Mr. Dan Wake field. Definitely, the Bar appears to know that I was in D.C., 'cause they made the calls to the Embassy in D.C. and according to the Ambassador, was July and August of 1991, so if there--you know, I think if there was--if--if-- I think that that information available to the Bar, that I think there's at least some effort, if they know that I'm there, that there be at least some efforts, but nothing was

ever sent to me at the Embassy in D.C.; even though I was not part of the Embassy, it's very likely that the Ambassador, since I was working directly with him and I was staying at his house most of the time until I got an apartment, would--would give me the--a pleading, or at least mail, if I mail was--was served there.

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In--let me--let me state that I believe I do have a defense against these two matters. On the F-322, the Sur matter, I was arrested and prosecuted, went through the whole gamut; a jury unanimously exonerated me from all of the charges. Even though the burden is different there than

it is here, I believe at the very minimum, it says that maybe I do have something to say, maybe I do have a defense.

As to matter 478, and I know with God's help, I will also be exonerated on that matter; but it's pending.

It's pending before--I mean it's a criminal matter pending. The facts are identical to the facts of this complaint, and I think that the spirit of this rule for all discoverance (?) proceedings here demand that at least that matter should be held in abeyance until the criminal matter has been disposed of or resolved.

Coming here this morning, I'm convinced that this panel has the power, you have the power, I believe, to correct the errors that

have been made in both matters pending here, that's been presented to you, and I respectfully request that the two matters be set aside, the two defaults be set aside, and give me the opportunity to defend against these serious charges. And these charges are extremely serious; the only thing you can give is disbanment from practice of law, and in the--the nature that's been so serious, I ask for the opportunity to defend

myself. And with that, I wish to commit to the panel, I am going to be here for the criminal prosecution; I never wanted to avoid any responsibilities there and I never wanted to avoid any responsibilities here. So, I commit to this panel that I will stay

in this State until after the- until the criminal prosecution is complete and then go through all the matters pending before the Bar, until every single one of those have been resolved before I leave the State again.

Thank you.

MR. WALLACE: All right. Let me ask you a few questions just so I can clarify a few things. Before you finished practicing in the State, or temporarily finished practicing in the State, was 165 South ~est Temple, the address at which you were located for-

MR. SCHWENKE: Yes.

MR. WALLACE: --your practice?

MR. SCHWENKE: That's correct.

MR. WALLACE: After you quit practicing, did you at any time notify the Bar of specific whereabouts, such as either in Samoa, D.C., New York, Idaho, anywhere such as that, given them some new address by which they could notify you?

24 MR. SCHWENKE: No, I did not. I didn't personally do that.

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MR. WALLACE: Have you seen the affidavit of Jam--Jamis M. Johnson in this case?

MR. SCHWENKE: No.

MR. WALLACE: All right. In this affidavit, and I'll be happy to have you look at it, give you an opportunity to look at it, it indicates in Paragraph 4, I

have opened his, being your, mail, at his request since approximately January 15th, 1991, and I opened the notice of the Bar in the captioned matter, and the captioned matter is the Sur matter, F-322.

Did Mr, Johnson ever send to you that notice?

MR. SCHWENKE: No.

MR. WALLACE: Did he ever talk to you about that notice and indicate to you that he had received a notice concerning the Sur matter?

MR. SCHWENKE: No.

MR. WALLACE: In any of these conversations that you had with Mr. Johnson after January 15th, 1991, which you've told us about where you consulted with him on

pending criminal charges and other matters, did he ever give you an indication that there was a notice outstanding or matters outstanding, complaints from the Bar Association concerning the Sur matter or the Wade matter?

MR. SCHWENKE: Well, he--he did not specifically say anything like that. In fact, the only conversations we

had were the criminal matter, 'cause that was the only sort of pressing thing.

MR. WALLACE: Now, I notice that you're here today; what notice did you have of this hearing and when did you receive that notice?

MR. SCHWENKE: When I appeared in my--the roll call hearing in February before

Judge Hutchings, I appeared with Mr. Johnson, and--and then he so advised me.

MR. WALLACE: And you're telling this panel that as of, what day was that in February?

MR. SCHWENKE: Probably February 6th or so.

MR. WALLACE: about February 6th. And are you telling this panel that that was the first time that Mr. Johnson indicated to you that there was anything pending before the Bar concerning the Sur matter or the Wade matter

MR. SCHWENKE: That was the only time he advised me that there was something pending, but it was not- nothing in particular with the Sur or Wade matter. He

just said what, you know, there is a sanction hearing, I believe some time in March, and then later, he-

MR. WALLACE: Well, when did he tell you that?

MR. SCHWENKE: This was at the time I was here last. It was--was February, around February 6th or so.

MR. WALLACE: February 6th of this year?

MR. SCHWENKE: That's correct.

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MR WALLACE: When you went to visit your wife, at the time that you were arrested, did she give you any of the mail that had been forwarded to her with respect to you personally?

MR. SCHWENKE: I have gotten the mail, but not at that time. I have since gotten the mail, after I returned from Utah, after my roll call appearance before Judge Hutchings, I went back to Las Vegas and collected a lot of the mails that were sent to her.

MR. WALLACE: Let me see if--and that was in December?

MR. SCHWENKE: No. That was here in February.

MR. WALLACE: In February. February, I--you're right.

As I see it, you basically have three positions concerning your objections to going forward I one is that you were not personally served, is that correct?

MR. SCHWENKE: That's correct.

MR. WALLACE: The second is that you received no actual notice of the complaints against you until February 6th of 1991, is that correct?

I'm talking about notice from either a person orally telling you that there was something pending or from actually seeing a complaint or a document concerning the Sur matter or the Wade matter, F-322 or F-478.

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MR. SCHWENKE: I saw a complaint now on the Sur matter, and that was in February, after February 6th, after I did appear and I retrieved the box with the mails that were sent to Wilma in Las Vegas.

MR. WALLACE: But that's one of your arguments, that you didn't have sufficient notice and only first learned of the matters

in February of 198--'92; is that your point?

MR. SCHWENKE: Yes, sir.

MR. WALLACE: I'm just trying to articulate your arguments here.

MR- SCHWENKE: Yes, sir.

MR- WALLACE: All right. Now, the third one I see is that under Rule 9(2)(3), a criminal matter is pending concerning the Wade matter, and you feel it's inappropriate for the Bar to proceed with that matter pending; is that another point that you're making?

MR. SCHWENKE: Yes, sir.

MR. WALLACE: Have I--have I correctly characterized the three points that you've tried to make?

No personal service, no notice and criminal matter pending, is that--

MR. SCHWENKE: That's correct.

MR. WALLACE: Are those your arguments?

MR. SCHWENKE: Yes, sir.

MR. WALLACE: Do you have any other argum this time?

MR. SCHWENKE: No.

MR. WALLACE: All right.

Mr. Smith, would you like to respond? No, wait. Excuse me. Do any of the panel members have any questions?

MR. TOBLER: Yes. I just have one question as a follow-up to what Mr. Wallace asked you.

Did you pay Mr. Johnson anything to look after you matters for you in your absence?

MR. SCHWENKE: No.

MR. TOBLER: It was just a request; Mr. Johnson was not representing you or your practice in these matters?

MR. SCHWENKE: No, that's correct. He was not attorney, more for a friend type of request. He appeared on my behalf in the criminal matter, but without any compensation.

MR. WALLACE: Well, and as far as you know, Mr. Johnson, Jamis Johnson, didn't ever notify the Bar that he was representing you as an attorney and would accept service on your behalf?

MR. SCHWENKE: I asked Mr. Johnson this

morning if he'd ever done that, based on what I asked him to ask the--to follow-up on the matters pending before the

Bar, and he said no. He said he did not represent that he was his--my attorney, and--and I never intended him to be my attorney. I wanted to at least get some notice of what as pending, and that was the purpose of his effort.

MR. WALLACE: Mr. Smith?

MR. SMITH: Well, the respondent is obviously mistaken about the rules regarding personal service. Rule XI(b) of the procedures of Discipline of the Utah State Bar points out that--it says Bar Council shall cause to be served upon the attorney in question a copy of the formal committee

complaint and summons. Let's see, I lost my place the latter of which shall require the attorney to appear and answer said formal complaint within 20 days after service, and it says, service shall be made personally upon the attorney in question or by registered or certified mail to the last known address of the official roster of the attorneys of the Bar.

And I submit that the record will--will speak for itself, that the last address which the respondent ever gave the Bar was 165 South West Temple, Suite 300, Salt Lake City, Utah, and the record will show that certified mail was sent to that address on each occasion, and that it did not come back unclaimed or returned. And the respondent has admitted that he has not kept

the Bar informed of his address, that he's gone all over the world, all over the

country and has never bothered to keep the Utah State Bar informed of his address, Knowing full well that there was conduct here in Utah that would be a--the subject matter of disciplinary action by the Utah State Bar. And knowingthat, he has--he has not and I submit intentionally not informed the Bar as to where he's been--where his where abouthave been, and the Utah State Bar, therefore, is entitled to rely upon the rules, and the rules say that we can--we can obtain service by--by mail to his last known address, that's what has occurred.

And as a matter of this hearing today, this was sent, as you'll notice, to--to an

address in Las Vegas, Nevada. Your records should indicate that it does not, it was not returned, that it was accepted at that address, and so I submit that the respondent has not been 'ully candid this this hearing panel, that he was fully aware that actions were pending against him, and--and that heintentionally, I submit, declined to keep the Bar informed of his whereabouts, for the very purpose of avoiding service of process. And the Bar should not have to chase him all over the country to do this.

And we have served him at the address thlt he provided us, and the only address that he provided us, we, on our own, we have located other addresses, which we have served him at, tried to serve him at, even though thev were

not officially registered with the Bar We've tried to accommodate him, we've tried to find him, and--and but when an individual takes it upon himself to become a fugitive and--and to run and hide from the Bar, the Bar shouldn't have to be penalized because of his refusal to keep the Bar informed of his whereabouts.

And the record speaks for itself, as far as the documents you have in the official file which show that we have obtained service in accordance with the rules, that the summons and complaint were served in accordance with therules, that defaults have been entered in accordance with the ~}es, and I submit that we should be able to go forward now on the hearing, on the purpose of having

a sanctions hearing, because defaults have been entered in both of these cases, and the only issue before this pane~ now is the appropriate sanctions to be entered against this responsdent.

MR. WALLACE: Your reply, Mr. Schwenke.

MR. SCHWENKE: No.

MR. WALLACE: Oh, do--does the panel have any questions of Mr. Smith?

MR. SCHWENKE: No. No further reply.

MR. WALLACE: You'd submit the matter?

MR. SCHWENKE: Yes.

MR. WALLACE: I suggest that we take a very brief

recess so the panel can discuss the matter, and I think we need to rule on this before we proceed any farther, and we'l ask

everyone to step out if they would, please.

MR. SMITH: Yeah. Yeah, may I just make one other comment?

MR. WALLACE: Yes.

MR. SMITH: I failed to mention, he made an allegation about the Bar calling him in--in Washington, D.C. and of course, I have no knowledge of that. I--I can unequivocally represent that nobody from the Office of the Bar Council called him there, and until he mentioned it a few minutes ago, I had no knowledge he was ever there.

And one other thing about the Rule 9 requirement that the matter be held in abeyance pending a criminal case. You'll notice that the language in that rule is permissive. It says that they may be held in abeyance, it doesn't say that they must be

held in abeyance.

MR. WALLACE: All right. Thank you. If we could have everyone step out for a moment.

(Off the record.)

MR. WALLACE: Mr. Schwenke, let me indicate that we~ve completed some deliberations and we've come to a unanimous decisions. Let me address some items one at a time, I'm certainly not goins to mention all of the things that might be possible grounds for our decision; but let me

mention just a few.

Concerning the criminal procedure pending, that is Rule 9(e), it says the continuance of a complaint, disciplinary proceedings may, and it is not in the affirm a tive, that it must, may be held in abeyance by the Committee We looked up the definition of the word committee and the committee is either the Ethics and Disciplinary Committee of the Bar or a panel thereof, and we constitute a panel thereof, prior to filing of a formal committee complaint, so we may have--hold matters in abeyance prior to the filing of a formal complaint, and we're beyond that stage now, a complaint has been filed.

Then it says, or by the Board, at any

stage of the proceedings. It appears to us that the Board probably has power, which by definition under Rule 3(b) is the Board of Commissioners of the Utah State Bar, that's the Board.

So, it appears to us that the Committee as defined, has the authority prior to the filing of a formal complaint to decide to defer, and after the filing of a formal complaint, the Board at any stage may de.er matters.

So, we don't know, one, if we have the power to defer matters at this time. Secondly,it's permissive and the Committee has decided to so ahead, so we are not going to grant any motion to continue or motion to not proceed

based on that at this time.

Secondly, concerning the lack of notice and the lack of personal service, the Bar of Disciplinary Rule does indicate that service may be at--by registered mail at the last known address; whether or not that provides due process is another question, but that's the rule and we

operate under the rule. And so we feel that your address was at the time, 165 South West Temple, that registered mail was sent there and that was the last known address. We think in a sense that that's sufficient under Rule 11(b).

However, in addition, it appears that you at least had some indication that there may be matters pending before the Bar. You talked to Mr.' Johnson about those matters

several months prior to this hearing date, you felt that there may be matters pending before the Bar, and in that sense, perhaps you had an obli~ ion. outlast at that point to follow through, notify the Bar of an address, or perhaps, even call yourself, and find out, Are matters pending? What is pending? I need to ~now the status of everything, rather than just wandering if matters are pending, or wondering if Mr. Johnson is representing your interests well, or wondering if the Bar might be able to find an address by which to serve you.

In addition, at least by February 6th, you were aware of these matters pending and matters pending, and we

feel that it would have been appropriate

immediately to try to bring some type of motion before the Bar, take some type of action, rather than waiting until now when there are, I'm assuming, I may be incorrect, but I'm assuming that there are witnesses here, I've seen you, Mr. Smith, talking to some people in the foyer and I assume that there are-

MR. SMITH: That's correct, sir.

MR. WALLACE: There are witnesses here?

MR. SMITH: Yes, sir.

MR. WALLACE: And first raising this matter whenthe witnesses are here and people have been inconvenienced. We feel it would have been appropriate to object timely; that would be at or about February 6th, 1992, so with those comments, and not precluding other reasons why we might have taken action, we

intend to go forward at this time.

Does any panel member have any other comments they'd like to make? All right

Is there any--are there any other preliminary matters, Mr. Schwenke, that you'r like to bring up before we turn the time over to Bar Conical on their side of the case?

MR. SCHWEKE: No.

MR. WALLACE: Mr. Smith?

MR. SMITH: Just like to clarify then that we are going on the assumption that the service was had, that the order--that the order entering the default has been properly entered?

MR. WALLACE: Yes.

MR. SMITH: So we're now at the sanctions portion of the hearing?

MR. WALLACE: Yes.

I might indicate to Mr. Schwenke, however, that the Board talked about those matters and we know the effect of the default, but in considering an appropriate sanction, we feel that evidence of whatever occurred, any evidence you might have that was presented at your trial, for example, in the Sur matter, anything you might have which would show that there was not any improper motive on your part or whatever else, we won't preclude you from putting on. If there is some indication of reasons, anything, doing with reasons why certain sanctions should or should not be entertained or why we should not entertain any sanctions against you, we will certainly listen to those

Is that correct? Am I misstating that?

MR. ROBLER: Yeah. One other comment, too, that you raised Rule 9 and we explained to you our Interpretation of that, but you certainly have the right to piscine the Board should you continue to feel that that particular

matter ought to be held in abeyance. The Board apparently has the right to--to--to do that. We feel that we do not have that authority under the rules. So, you--you--I--just so that you have knowledge of how you might proceed.

MR. SCHWENKE: Thank you. Could I respond to that?

I--given these two points that have been made, that I can at this hearing present evidence, that--I thought the sanctions

hearing is just merely taking what they have on default as admitted fact and issued as sanction and--and must be mistaken with that. And secondly, given that I think if--if the right is to the Board, I would like to appeal to--or have the opportunity to be able to pursue that right with the Board to, either to hold matters in

abeyance, so again, maybe, not necessarily renew our motion but ask that maybe matters be held at least to give me a chance to go to the Board and see if the Board will hold matters in abeyance pendins the criminal matter.

MR. WALLACE: Well, we--we do, and because the witnesses are here, and the hearing was set, we do intend to proceed at this time with the taking of whatever

evidence the ~ar intends to put on at this time.

After that is finished, we may discuss again what we should do with respect to that, whether we should make a decision or a determination right now, we did not

discuss that, and I don't want to, you know, say what we would do without discussing it with the full members of the panel, so we will do that at some time

Let me just indicate concerning the first point you made, that this was the time set for sanctions, but of course, even though certain aspects of the complaint are deemed admitted, there may well be several tames of explanation of why certain things were done, even though it's admitted for example, a

check was cashed, what happened to that check, what happened to the proceeds, what was done with it, may be of importance to us, and those, I would assume where it would be matters of mitigation and in detenmining sanctions, we want to hear matters concerning aggravation and matters concerning mitigation and we would expect that you would have been on notice that you at least could have provided that information, and we'll give you an opportunity to be personally heard on such matters today.

MR. SCHWENKE: And--okay. I thought--I guess what I'm asking them on the first issue, given that I do have--point to you that right to present that, if I mav be able to do that at a later day here again, 'cause there is a transcript of the criminal trial,

and there's a lot of evidence there that I know are mitigating evidence, and I was clear under the impression that the proper forum for me to bring my objection as to the due process and whatnot was

here, and apparently that's not the case, and so I ask if the Bar Council can put on their evidence, but I be permitted to, at least, for mitigation purposes or whatever purposes to bring, you know, set another time to do that.

MR. WALLACE: We will allow Bar Council to proceed at this time, we'll take your motion to allow you to put on contrary evidence under advisement. At the close of their case, we'll discuss that motion and

make a determination cf whether we will allow you to do that.

MR. SCHWENKE: A11 right. Thank yob.

MR. SMITH: And for the record, of course, we object to that. I again point to the fact that every indication we have indicates that the respondent is living in Las Vegas, Nevada, that this notice of this hearing was sent to him on the 6th of December, 1991; he's been on notice of this hearing now for two months, or three months, and I'd represent to the panel that he's never contacted me or the Office cf Bar Council about this proceeding or the nature thereof, or -that he should do. he's an attorney, he can read the rules, and I submit that this is nothing but a delaying tactic, and we enter our objection to any further

continuances.

And with that-

MR. WALLACE: All right. With that, you mayproceed, Mr. Smith-

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MR. SMITH: Thank you, sir.MR. WALLACE: --and call witnesses.

MR. SMITH: We just want to put some exhibits into evidence that really are already--already there. The formal complaint, we just Wanted to have everybody have a copy of the formal complaint.

MR. WALLACE: Do you have copies for Mr. Schwenke at this time?

MR. SMITH: I do. And although that's in the record and part of the official record, nonetheless, just for the sake of everybody having something to look at, we wanted to--to

have those marked and everyone have a copy.

So, this is original copy for the record, and like I say, it's already a part of the formal record, however, we wanted everyone to be able to have a copy for their own use, and so for that reason, I'm marking those.

MR. WALLACE: All right. I now have in my possession the formal complaint, F-322, marked for these proceedings as.Exhibit 1.

You've received a copy of that, Mr. Schwenke?

MR. SCHWENKE: Yes.

MR. WALLACE: Do you have an objection to our receiving Exhibit 1?

MR. SCHWENKE: No.

MR. WALLACE: All right. Now, I also have a

summons in the matter F-322, is this marked--it is not marked as an exhibit.

MR. SMITH: That should be actually a part of Exhibit 1. It just got separated.

MR. WALLACE: All right. This is the summons and will be a part of Exhibit 1.

Have you received a copy of that Mr. Schwenke?

MR. SCHWENKE: Yes, sir.

MR. WALLACE: Do you have an objection to our receivint the summons?

MR. SCHWENKE: No.

MR. WALLACE: All right.

MR. SMITH: And likewise, what we've had marked as Exhibit 2, the--a default, likewise is a part of the official record in the case. Once again, however, for the sake of everyone

being able to have a copy of the documents for their own use during the proceedings, we have marked these as Exhibit 2. I'd offer that.

MR. WALLACE: All right. I now have--the panel 10W has the default in the case F-322 marked as Exhibit 2.

Have you received a copy of that, or. Schwenke?

MR. SCHWENKE: Yes, sir.

MR. WALLACE: Do you have any objection to the Panel's receiving that in evidence?

MR. SCHWENKE: No, but may I state that, you know,

(inaudible - tape problems) objection to all these matters being properly served; right? That-

MR. WALLACE: Correct. Without walvin~ theprior objection to our going forward-

MR. SCHWENKE: Yes.

MR. WALLACE: --and without it, would you have any objection to this being received as evidence under the circumstances under which we're proceeding?

MR. SCHWENKE: No. No, sir.

MR. WALLACE: All right. The record should acknowledge that Mr. Schwenke is not waiving any of the objections he has made prior to the--concerning the entry of default.

MR. SMITH: All right. The next--we're going to omit Exhibit 3, so we can renumber this one Exhibit 3 if you'd like so we can have the record to be--we had an Exhibit 3, we--we've changed our mind and we're going to

withdraw that one, and are offering Exhibit 4 instead, and this is a certified copy of the Court records obtained in the case of Karyn Sur vs. A. Paul Schwenke and Bruce Udall in the District Court here in Salt Lake.

MR. WALLACE: We now-

MR. SMITH: We'd offer the certif ed copy, theclerk has a certified copy.

MR. WALLACE: The panel now has Exhibit 4 which is

a stipulation and order in Case No. 88-01441, Karyn--or Karyn, I'm not sure how you pronounce that, Sur, plaintiff, vs. A. Paul Schwenke and Bruce Udall, defendants, before Judge John A. Rakish.

Have you received- copy of that stipulation and order?

MR. SCHWENKE: Yes, sir.

MR. WALLACE: Do you have an objection to our receiving in evidence at this time?

MR. SCHWENKE: Yes, sir, I will have to object to that as improper evidence before this panel on the basis that this--it's terminated a stipulation, the stipulation has not been signed or--or agreed to, there could not be a stipulation.

The order of the Court, if it's signed, obviously I can't object to that I but as far as the stipulation, I will have to object to that because I did not stipulate to that.

MR. WALLACE: Mr. Smith?

MR. SMITH: This is a certified record, and I believe that the record Will show that this stipulation was read into evidence by the Judge; however, Mr. Clawing, counsel for

Miss -- Mrs. Sur, is present in the hearing room today and has just provided me with a -- with a Stipulation which I was not aware of, which indicates pursuant to the case, it has been changed somewhat, and has been signed by the respondent, so then we would-

MR. WALLACE: Do you want to withdraw Exhibit 4?

MR. SMITH: Well, we want to--at least we can stipulate--not all of it, but at least the stipulation and order were changed.

MR. WALLACE: Well, Exhibits 1 and 2 arereceived, Exhibit 4 is not received, subject to it being tied up. If--if you want to make copies of exhibit--that-

MR. SMITH: Yes. I'll just show this

one--show this one to the respondent, which purports to have his signature on it, and ask him if that bears his signature, the 's not a witness, but at least it does purport to bear his signature.

MR. SCHWENKE: I would still object, your Honor- I mean, the Honorable panel here, I don't recall the circumstances, the documents show, you know, but cross outs and whatnot, and I don't recall the circumstances wherein this was ever signed. The signature, I--it would appear to be my signature.

MR. WALLACE: Are you offering this as an exhibit?

MR. SMITH: Yes. I'll offer that as a--

MR. WALLACE: What number would that be?

MR. SMITH: It will be the next one in

order, it

would be 4.

MR. WALLACE: No. We have a 4.

MR. SMITH: Well, we're going to--we're going to renumber 4--

MS. WILKINS: They--they want to redo that one.

MR. SMITH: Beeause we withdrew our No. 3, so then ehange 4 to 3.

MR. WALLACE: All right. Let the record--let the reeord show that the stipulation and order whieh was previously mentioned as Exhibit 4 is now being remarked and 11 is Exhibit 3, and you're now going to mark as Exhibit 4,the dominate you've just been referring to, whieh was signed by Mr. Sehwenke?

MR. SMITH: Correet. And we ean-

MR. WALLACE: All right. That's not--that will not yet be reeeived over the objeetion of Mr. Sehwenke until it's tied up as to whether or not he actually entered into that stipulation and what the various cross outs mean and whether he agreed with the cross-outs or whatever.

So, we'll take the--

MR. SMITH: Right. Just so the reeord is clear, the stipulation and order that we have attached hereto previously as--as Exhibit 3 eontains doeuments other than

the stipulation and order, and for that reason, we would- we would like them both placed into evidence because the-the one that we

initially offered is a certified document and it contains the signature of the judge and the certified

MR. WALLACE: Okay. Let's--let's back up a little bit then.

MR. SMITH: So that we don't have-

MR. WALLACE: In Exhibit 3, Mr. Schwenke, there is a stipulation and order consisting of five pages, which appears to have the signature of John A. Rakish at the bottom. That's the first document; do you have any other objection to the receipt of that document other than what you've just stated, that it doesn't bear your signature and the other arguments that you made?

MR. SCHWENKE: That's correct.

MR. WALLACE: All right. ~ow, the next page is a minute entry I do you have any

objections to the panel receiving the minute entry?

If you need time to review that minute entry, take what time you need, Mr. Schwenke.

MR. SCHWENKE: No.

MR. WALLACE: All right.

MR. SCHWENKE: No objection to the minute entry.

MR. WALLACE: All right. That will be received, if we have to--if the other is not received, we'll break

that out and make it a separate exhibit.

The next document is a judgment in the same case, Civil No. 88-01441, appears to be executed by Judge John A. Rokich, and it appears to have the certificate of the clerk

of the Court; do you have an objection to the panel receiving the judgment?

And take what time you need to read the entire judgment, Mr. Schwenke. I'm not trying to hurry you.

MR. SCHWENKE: Yes. I would object to that 'cause this was judgment entered based on the stipulation which I wasn't in fully accordance--I mean, astipulation that I didn't agree with.

MR. WALLACE: All right. That will not be received unless it's further tied up, at this time.

MR. SMITH: All right, sir. At this time, we'll call Karyn Sur as a witness, and we're going to ask Mr. Sam King who is currently counsel for Karyn Sur in the civil matter pending, to interrogate that witness,

in as much as he's more familiar with the underlying facts of the case, and so, we'd call Karyn Sur, and Mr. King, would you do the honors, please?

MR. WALLACE: Mr. Schwenke and Mr. Smith, I--I have just read the judgment myself, and I don't know that the judgment is based on the stipulation. It says the Court having previously entered its findings of fact. I

think we will admit the judgment because it is a certified copy, an appropriate judgment, for whatever it states in there, that--for the purpose of showing that a judgment was entered against Mr. Schwenke, but I don't know that I can--we can read anything else out of that;

but we will accept the judgment.

MR. SMITH: All right, sir. I understand.

MR. WALLACE: But we will accept the judgment, so that--that has been received.

Would you please face the clerk and be sworn, Mrs. Sur?

KARYN SUR,

called as a witness by and on behalf of the Bar Council in this matter, after having been first duly sworn, was examined and testified as follows:

MR. SCHWENKE: Mr. Chairman?

MR. WALLACE: Yes?

MR. SCHWENKE: May I object to Mr. King partial pating in this matter on behalf of the Bar Council and on the basis there's no notice that Mr. King was going to be counsel

here as well.

MR. SMITH: Mr. King-

MR. SCHWENKE: For the-

MR. SMITH: --is not Bar Council, I've simply asked him, because he' s more familiar with the civil matter

and the matter involving Ms. Sur to--t ask the questions of her concerning the injuries and damages she suffered in the automobile accident and the problems she's had as a consequence of the actions giving rise to this complaint. He's not representing the;Bar Council; however, I would ask him to--ask him to--to interrogate his client for me.

MR. WALLACE: Your objection is noted, Mr. Schwenke. I think for purposes of just

moving this hearing along, that may expedite matters, and I don't know that Mr. King would get any other information out of the witness than Mr. Smith, and I don't think you're probably prejudiced in that regard, so I'm going to allow Mr. King to go ahead.

MR. KING: Thank you.

If I might, that edited stipulation that Mr. Schwenke signed, this was not entered by the Court as a stipulation because--

MR. WALLACE: I think we'd better be careful here.

I think we need to proceed by witness, and I think if you're going to make such representations--

MR. KING: Okay.

MR. WALLACE: --you should be--Mr.Smith

should call you as a witness and have you sworn, and then we'll get into that.

MR. KING: Fine. All right.

DIRECT EXAMINATION

BY MR. KING:

Q You're Karyn Sur, and you're the plaintiff in the civil action against Mr. Schwenke, 88-01441, Salt Lake County District Court?

A Yes.

Q Thank you. Now, did you ever know if Mr. Schwenke received a total of four checks before--some years after you contacted Attorney Jim Hawkes, who found that out?

A I--

MR. SCHWENKE: Objection. Leading.

MR. WALLACE: Did you or did you not?

THE WITNESS: I didn't know there was four checks until '87. I only knew of two.

Q (By Mr. King) Okay. Now, the second two checks; did you ever see or sign them?

A No.

Q At the time Mr. Schwenke was settling your case, that was in 1985, wasn't it?

A Yes.

Q And at that time, you had had surgery, in Utah, on your back?

A In Nevada.

Q In Nevada?

A Las Vegas.

Q And had been referred to a Dr.

Watkins in Los Angeles?

A Yes.

Q Before this subject accident, you'd had two other major back injuries?

A Yes.

Q And it appeared that you needed--

A (Inaudible)

Q --a major back operation, kind of from top to bottom; is that correct?

A My entire low back.

Q Uh huh (affirmative).

MR. SCHWENKE: Excuse me, Mr. Chairman. May I have a standing objection to Counsel leading the witness.

MR. WALLACE: Please try not to lead her.

MR. KING: I'll--yes.

Q (By Mr. King) Was Dr. Watkins

referred to you as being the specialist in reconstruction?

A Dr. Williams recommended him, my doctor in Vegas. He said that's the only specialist he used, and is the only one that handles problems back.

Q Okay. Okay. Now, at the same time your case was being settled by Mr. Schwenke, did you see Dr. Watkins in Los Angeles?

A Yes. I went down there for tests and to see if he

could help me or not.

Q And did you have an estimated cost of surgery,

something like $95,000?

A Yes. It was $5,000 for testing and $96,000 for the surgery.

Q Okay. Did you pay the $5,000 for testing?

A No. I couldn't afford it.

Q Okay. Because of what happened to the proceeds on your claim, have you ever had that operation?

A No. I have not.

Q And how old are you now?

A Forty-six.

Q Are you no receiving early total Social Security

disability?

A Yes.

Q Is that because of the injuries in this accident for which you haven't received the treatment you need?

A Yeah, 'cause I can't--can't have that surgery, because my back (inaudible) I can't work, I'm totally 20 disabled.

Q And through Social Security, have you tried to get this funding? Just yes or no.

A I've tried talking to them and they won't pay for it.

Q Too much moneys

A Yeah.

Q So for the last six years then, have you been disabled?

A Totally disabled on Social Security

and SSI, both.

Q And to your knowledge, was there enough money in the fund from the two defendants to have fully paid the surgery?

A Yes.

Q If we can do the--

MR. WALLACE: Enough money in the fund from what?

MR. KING: All right. Let me back up on that, your Honor.

Q (By Mr. King) There were two defendants who were jointly negligent, they collaborated with each other-- this is kind of--it's in the judgment, and their cars then both collided with yours, is that right?

A (Inaudible)

Q And both defendants had $100,000 in liability insurance?

A Right.

Q So there was $200,000 available for you?

A Yes.

Q And Mr. Schwenke's fee was 28 percent?

A If I recall, or--(inaudible)

Q So, if Mr. Schwenke had settled for $200,000, he would have had 56,000 as his 28 percent--A Yeah.

Q --and you would have had 144,000?

A Yeah. I would have paid my surgery and had some left over, in--in (inaudible)

Q What medications are you taking at the present time, Karyn?

A (Inaudible) Percoset, aroset, maclamin and (inaudible)

Q And are you having any deterioration or any problems in your right leg now?

A My right leg has atrophied a half an inch.

Q Are you capable of being physically active?

A No, not at all.

Q Before the accident, were you a long-line lady truck driver?

A Yes. I was a truck driver.

Q And the two accidents that you had before this accident; had you recovered to the point where you were going to go back to work?

A Yes. As a matter of fact, when I got hit, I was-- my son was behind us, I was taking it to the shop and then I was going to

my doctor, Dr. Horne, to get--I had my back fused, it had been six months, and (inaudible) all right

and It was specced out or me, so I could drive it I was trying to get the okay to drive, when I was sitting at the red light and two cars hit me, broke my fusion and ruptured my back again. So, we had to get the truck back, let it go back.

Q Okay. On your part then, as soon as you had passed the inactive time Dr. Horne had required, was it your intent to go back to work?

A Oh, definitely. That's why we bought the Ford, that's why we (inaudible) out that way.

MR. KING: Anything else you want me to

ask?

Nothing further.

MR. WALLACE: Mr. Schwenke?

MR. SCHWENKE: Yes. Just a couple.

CROSS-EXAMINATION

BY MR. SCHWENKE:

Q You stated that the checks that were received, you haven't seen it, and you haven't signed it, endorsed it; is that correct? That's your own testimony?

A Two of them I didn't see.

Q Two--

A Yes. Two I signed, and two I didn't sign.

Q And you also deny knowledge or denied in the criminal case, that you signed the other two checks?

A Right. I did not sign them.

Q And you're denying now that YOU went to the bank with me, like you denied it in the criminal case, and you signed the two checks in front of the bank officer, the checks that you claim--

A The time I went to the bank with you is when I found out that they took my $25,000, that was in my annuity.

That's the only time I went to the bank with you.

Q And in the criminal trial, the bank officer testified that you appeared with me, you showed him I.D. and you signed the two checks and he initialed that you showed him the I.D.; are you saying here that is false?

MR. WALLACE: Let me--I think you have two questions there; let's ask the first one.

Are you aware of what the bank officer testified to in the criminal matter?

THE WITNESS: I heard about it afterwards. But when I saw him and talked to him in the hallway, he didn't recognize me or know who I was.

MR. WALLACE: Okay. But you weren't--

THE WITNESS: I heard about it later--

MR. WALLACE: --in Court and didn't hear him testify to that?

THE WITNESS: No. I was just a witness (inaudible the D. A.--County Attorney or D.A., whichever it is, he was

trying it, as I was outside.

MR. WALLACE: Okay. Then the next question?

Q (By Mr. Schwenke) The question is

if the bank officer in his testimony claimed that you appeared with me before him, you showed him I.D., your I.D. and you signed the check before him, and he initialed the checks, that testimony would be a lie?

A I don't know if he was lying or not. I wasn't in the room. I did not go with you to the bank. I didn't cash the first--or sign those first two checks.

Q What time were the checks--

A In your office, the second two, I did not.

Q --that you claim you never signed?

A I did not go with you and I did not sign them.

They were proved forgery by our experts and you admitted to it in Court. I've got the transcript. You admitted forging my

name. I've got the transcript.

MR. SCHWENKE: I move to strike that, that's un-responsive.

MR. WALLACE: We need to proceed a little bit orderly. I'm sure you have some feeling about Mr. Schwenke and we need to have you just answer his questions as narrowly as you can, and then--

THE WITNESS: (Inaudible)

MR. WALLACE: --Mr. King--well, you're able to

answer fully. If there's something wrong with the way he asks the question, you can certainly correct that and say no, that's not correct; but try to limit your answers to what he asks you, and then Mr. King can bring out other matters from you that you may

have a feeling that you'd like to say to the panel, just to proceed in an orderly fashion. Thank you.

Go ahead, Mr. Schwenke.

MR. SCHWENKE: I--I believe she denied that--the testimony of the bank officer, and with that, I--I don't have no further questions.

MR. WALLACE: Okay. Anything further, Mr. King?

REDIRECT EXAMINATION

BY MR. KING:

Q The transcript you're referring to from the bankruptcy hearing, do you have that with you or is it available?

A From our pre-trial?

Q Well, you said there was a time that M,r. Schwenke said in some court, that

it was not your signature; do you have a--and you--and you said, as I understood it, that you had a transcript of that; did I understand you correctly?

A Yeah. I've got the whole transcript at home, I didn't bring that part and I'll get it, too. I don't think

I brought that part of the transcript. No, that's one part I didn't bring. It's real thick, I remember I had him do his entire testimony in Court that showed where he admitted it.

MR. KING: Okay.

MR. WALLACE: All right. Well--well, I have a few questions, we're talking a little bit vaguely and I want to be a little bit more specific.

You indicate that you endorsed the back of two checks; is that correct?

THE WITNESS: Yes.

MR. WALLACE: Do you know if those ere checks from the Western Insurance Company?

THE WITNESS: Yes, they were.

MR. WALLACE: Western Fire, in fact?

THE WITNESS: Yes.

MR. WALLACE: Was one approximately $27,800?

THE WITNESS: Yeah, I wasn't--

MR. WALLACE: Was one approximately $13,381?

THE WITNESS: Yes. Those two, I signed.

MR. WALLACE: What happened to the proceeds of those after you signed those checks?

THE WITNESS: I was told by Mr. Schwenke

that $13,000 went to pay my medical bills, and that the other check was to go in to an annuity for me for the $250 a

month for life--

MR. WALLACE: Was there-

THE WITNESS: --is what I understood.

MR. WALLACE: Did you understand that he should receive some type of a fee for services in settling this claim for you?

THE WITNESS: Oh. yeah, I knew he would thought they--

MR. WALLACE: What was your understanding with respect to the payment of that fee? Was that to come out of these two checks, or was that something else?

THE WITNESS: No, 'cause he'd already told me what those two checks were for;

medical payments and my annuity.

So, I figured he had got with them and settled and got some more money.

MR. WALLACE: All right.

THE WITNESS: I didn't know.

MR. WALLACE: And you don't recall ever having seen or negotiated or endorsed two other checks of identical amounts from the Colonial Pen Insurance Company?

THE WITNESS: No.

MR. WALLACE: Did Mr. Schwenke ever indicate to you that there was the possibility of obtaining more money than that which you signed? That is, that he thought it was a possibility that the insurance companies would pay

out $200,000

THE WITNESS: No. He told me that's the best I could do, and it was a darn good judgment for somebody who already had two previous injuries and problems, and that's the best I could do.

MR. WALLACE: I'm assuming that your fusion was down about L-4 and 5 if you're having leg troubles; is that correct?

THE WITNESS: Yeah. It was 3-4, 4-5 and S-1L5.

MR. WALLACE: Okay. Would you describe for us briefly the nature of the other two accidents that you had?

THE WITNESS: The first one, I was driving for CF and I don't know--they're--I don't know if you know--

MR. WALLACE: Consolidated Freightways?

THE WITNESS: Yes. They're not very good

equipment. The seat, air seat bottomed out on me on a construction bump, and it ruptured my low back and my neck and I have a chip floating in thevocalcords. So, I had one--the first surgery, they took care of one disk, I went back and I drove truck across country, my own, and the seat in the truck, they forgot to take the blocks off the airbags on my Ford, so the seat was pounding my back and it ruptured my back again, so I had a second surgery, which was the fusion. And then on that fusion, I was supposed to go back to driving, and that was the day, I was taking my

driver to the shop and I was going to go to Dr. Horne for permission to go back to driving.

MR. WALLACE: What was fused? What levels?

THE WITNESS: From the 3-4, 4-5 and S-1L5 all the way down.

MR. WALLACE: All the way.

THE WITNESS: I was there six months.

MR. WALLACE: And then, were you a passenger in one of these two vehicles?

THE WITNESS: No. I was sitting at a red light, when they collided with me, (inaudible) one pushed the other one into me. I was just sitting at the red light.

MR. WALLACE: All right. Were you hospitalized after that accident?

THE WITNESS: Yes.

MR. WALLACE: And how long were you hospitalized?

THE WITNESS: I had problems with one,

there was a piece missing out of the fusion and he said my body dissolved it and it was fine; so I sent all my X rays in to the specialist in Vegas, Dr. Williams. And Williams discovered that the chunk that was missing was actually in my spinal cord, it severed my spinal cord. So, he had to go in and take out the old fusion and replace the disk at the S1-L5, with something he calls Jel-Foam. And scraped all the tissues and whatnot, they took out the old fusion,

I have no (inaudible) joints or wing bones in my lower back any more for stabilization, that's why I have to have in-body fusion.

MR. WALLACE: Okay. There's some indication in the complaint that there were

outstanding medical bills at the time of settlement of the complaint for $11,179.96.

Is that--do you know anything about that?

THE WITNESS: I understood (inaudible) paid them--

MR. WALLACE: Pardon?

THE WITNESS: I understood that someone may have paid them; they gave me cash for the surgeon.

MR. WALLACE: Well, my question is, was that, to your knowledge, about the amount of the outstanding medical bills at the time of the settlement; that is $11,179.96.

THE WITNESS: No. I thought they were all paid.

MR. WALLACE: Okay. They had already been paid as of the time of the settlement?

THE WITNESS: Yeah. I thought they'd already been paid.

MR. WALLACE: What I'm--all right. Were there any other medical bills that were outstanding or unpaid at the time of the settlement?

THE WITNESS: There shouldn't have been, 'cause I'd already had my surgery and -

MR. WALLACE: Now, what was the surgery that was contemplated by this Dr. Watkins? Watkins, was it?

THE WITNESS: Watkins, right. He was a specialist that does body fusions for people who have had other surgeon mess up their back to the point that there's nothing left but to go through the stomach and fuse.

MR. WALLACE: Was Mr. Schwenke aware of

Dr. Watkins and the tests done by Dr. Watkins at the time of settlement of this matter?

THE WITNESS: Yeah. He knew I was going down there. He gave me my first $250 annuity check for the gas to go down there.

MR. WALLACE: All right. Now, the $250 annuity check, which you thought was coming from a purchased annuity; is that correct?

THE WITNESS: Yeah, it was supposed to have been Prudential, and we had he sign a paper--

MR. WALLACE: So the-

THE WITNESS: --to purchase the annuity.

MR. WALLACE: You used that $250 to help you go down to Los Angeles; is that correct?

THE WITNESS: To see Dr. Watkins

MR. WALLACE: Now, did you know you were going to go down to Los Angeles and see Dr.

Watkins prior to endorsing the back of the two checks you indicated you

endorsed?

THE WITNESS: The first two?

MR. WALLACE: Yes.

THE WITNESS: I don't know in what sequence.

MR. WALLACE: What I'm getting at is, did Mr.--

THE WITNESS: I mean, after my surgery, it had to be done, I had the Watkins, that was the next step.

Williams had already told me that after my surgery.

MR. WALLACE: Dr. Williams was the doctor who performed the surgery?.

THE WITNESS: Yeah. Did the--

MR. WALLACE: All right. Did--

THE WITNESS: --surgery.

MR. WALLACE: Was Mr. Schwenke--did you tell Mr. Schwenke that you had had the surgery from Dr. Williams and that you were probably going to need or possibly going to need further surgery and you were going down to see--

THE WITNESS: Yes. He knew that.

MR. WALLACE: Did he know that prior to the settlement? That's what I'm getting at.

THE WITNESS: It was prior to the second two checks, it was before the second two checks.

MR. WALLACE: It was before you found out about the second two checks?

THE WITNESS: Yes.

MR. WALLACE: But it was after the first two checks were signed by you, endorsed by you?

THE WITNESS: Exactly on that, I'm not sure.

MR. WALLACE: All right. You had had the surgery prior to signing the two checks?

THE WITNESS: Before I signed them. Yeah. One back surgery.

MR. WALLACE: One back surgery.

THE WITNESS: So, he must have known, yeah.

MR. WALLACE: Okay.

THE WITNESS: Because I knew right after Williams that I was going to have to go to Watkins for an in-body fusion; Williams had already told me.

MR. WALLACE: Did--did you ever talk to

Mr. Schwenke? If you think--I mean it sounds like that you're a little bit vague, but you think maybe he should have known; did you ever talk to Mr. Schwenke and say, well, look, they've covered my medical expenses up to now and if these are the total settlement proceeds, how am I going to pay for the surgery that~ I may have to have from Dr. Watkins in Los Angeles? Do you understand where I'm going?

THE WITNESS: Oh, okay. I'm vague on that. I know there was a discussion of it, where the money was going to come from: I'm not sure if I figured he could get

more or he would still try to go after them for more, if I needed the surgery or had the proof of it or what, I'm not sure. I

don't recall that. But he did know I had to have surgery, and he knew I was going down there for a check-up.

MR. WALLACE: He--he--did he know you were going to have to have surgery or did he know you were going down to have a check-up to see if you may need some further surgery?

THE WITNESS: No, I didn't go down to see if I needed it, it was to see if he could help me. It was needed It was just to see if the one person that could help me.

MR. WALLACE: What was the surgery Dr. Watkins was going to do-

THE WITNESS: The in-body fusion.

MR. WALLACE: --for 96,000?

THE WITNESS: The in-body fusion.

MR. WALLACE: Okay.

THE WITNESS: Go through the stomach,

fusion of the spine.

MR. WALLACE: Okay. Anything? Okay.

Any questions?

MS. WILKINS: Have we established the amount of money that she has received?

MR. WALLACE: It's probably--do you know if the total of the number of payments you've received, these $250

payments is approximately $4,500?

MR. KING: Pursuant to the judgment, he made one $250 payment and he conveyed a piece of property worth a couple of thousand dollars, and that's why the judgment is for 97,000, making full credit for the payments made, 'cause if you'll notice the judgment, I waited a year trying to get more before I took the final judgment to the judge.

MR. WALLACE: Okay. Let me--did you at some time have some understanding that two pieces of real property were going to be conveyed to you, one in Duchesne County, one in Weber County?

THE WITNESS: Just the one in the Duchesne, the one above Uintah.

MR. WALLACE: Above Uintah? In Weber County, up near Ogden

THE WITNESS: Yeah--no. Is that what it is?

MR KING: Uh huh (affirmative).

THE WITNESS: Oh, yes. Yeah, That first was like (inaudible) his wife's name was on it.

MR. WALLACE: Okay. Did you know anything about any agreement that another piece of property would be transferred to you

in some fashion, out in Duchesne? I was wondering if you had heard anything like that.

THE WITNESS: Well, I thought that the five acres

was in Duchesne, it's just above Vernal in the mountains.

MR. WALLACE: Just above Vernal in the mountains?

That's the one you've received? I've forgotten now which one you received.

THE WITNESS: Yeah. Through Bruce. Bruce is the one that gave it to me (inaudible)

MR. WALLACE: Okay. Now, back up. Did you hear anything about supposedly another piece of real property supposed to be

transferred to you to help settle this claim?

THE WITNESS: No. One time they offered an eight-plex and stuff, when Jim Hawkes was my attorney, but I don't recall any other than that five acres up by Vernal that Bruce gave me.

MR. WALLACE: Okay.

THE WITNESS: Was it two different properties? thought just the one up by Vernal.

MR. KING: May I respond?

THE WITNESS: Oh.

MR. WALLACE: Well, let--I just want to get what she knows now. Just one other question. Did you ever receive any proceeds from two checks, to your knowledge, receive the proceeds, have use of the money from two checks from Colonial Penn, one for

approximately $27,847 and one for

$13,3817

THE WITNESS: For two years, I was getting these so-called annuity payments which was supposed to be the 27,000-some-

MR. WALLACE: Right.

THE WITNESS: I wheeze getting the 250 a month until September of '87, I believe it was, was when I found out through my bank that it wasn't coming as an annuity, that it come from his personal account, and that's when I started investigating it; so it must have been, what, about two years, I guess, I got the 250 a month.

MR. WALLACE: Okay.

THE WITNESS: And he did wire me some money in L.A.

MR. WALLACE: How much was that?

THE WITNESS: I don't know exactly.

MR. WALLACE: Is that while you were seeing Dr. Watkins?

THE WITNESS: Yeah. That's while I was down there.

MR. WALLACE: Approximately how much would you guess? Was it $100, $50, a thousand?

THE WITNESS: Oh, no, it was a couple thousand. Is it in there? I'm sorry, I don't know exactly.

MR. KING: If I might, your--if we could refresh

the witness ' recollection by Page 4, Paragraph lOA of her trial brief, she has the itemization of dates and amounts.

MR. WALLACE: All right.

MR. KING: And that was information we received from her, so it might refresh her.

MR. WALLACE: How much does that state?

Do you have an objection if I ask how much it was that you sent her down in Los Angeles?

MR. SCHWENKE: No.

MR. WALLACE: How much was it?

MR. KING: Okay. It's a pleading the Court has in its file. September--was made on September 23, 1985, I'm quoting, because plaintiff was to see Dr. Watkins on September 25, 1985, in Los Angeles for testing and for further surgery. She'd been notified this testing alone will be $6,000, defendant gave her the $6,000 on the date of the settlement, 5,000 more two days later when she was in Los

Angeles, and then the other 310, 'cause he had a total credit originally of 11,310. And nothing more. And he did for two years pay on the annuity at 250 a month; we have a disagreement, he claims that's 6,000, we claim it's 4,500.

In the pleadings we've used, we've accepted his 6,000 as paid on the annuity, so she'd have a total of 17,000 paid.

MS. WILKINS: Plus a piece of property.

MR. KING: The piece of property in--by Vernal has been received, it is undeveloped recreational property with no access; maximum value $2,000. The piece of property--

MR. WALLACE: Well, I think we're getting into some facts, we probably ought to--

MR. KING: Oh, I know, but I thought I was responding to the question.

(Inaudible)

MR. WALLACE: Well, I think I asked if he had an objection if we asked how much was sent to her in Los Angeles.

MR. KING: Six thous--five thousand.

MR. WALLACE: All right. And what--what is this 6,000? When did you receive that 6,000?

THE WITNESS: I don't remember exactly.

MR. WALLACE: Was that in addition to the $27,846.88 that you received when you signed the checks?

THE WITNESS: I didn't receive that.

MR. WALLACE: Oh, you didn't receive that, that's right.

THE WITNESS: That went into the annuity, the 250 a month.

MR. WALLACE: All right.

THE WITNESS: And 13,000, I was told, was to pay my medical bills.

MR. WALLACE: Okay. So you've received $6,000 and then another time 5,000 while you were in Los Angeles, and then another time $310?

THE WITNESS: I don't remember the 310 but I do remember the other.

MR. WALLACE: All right. And then another $6,000 through annuity payments, $250 a month annuity payments?

THE WITNESS: That was about two years I got the 250 a month.

MR. WALLACE: All right. Anything--any

other questions?

MS. WILKINS: So, the amount of money she should have received, total? Is how much?

MR. WALLACE: That's--

THE WITNESS: The four checks, there was two of them the something, equal, and two of them for the 27,000 equal--

MS. WILKINS: So--so minus his attorney's fees, is that right?

MR. SCHWENKE: I'm sorry. I didn't hear that. What was that amount, please?

MS. WILKINS: Just trying to establish how much money she should have received from those four checks that were made from the insurance companies, and I guess we've already heard what your attorney's fees were supposed to be.

MR. WALLACE: All right. Anything further, Mr. Schwenke, after--

MR. SCHWENKE: No.

MR. WALLACE: --that you'd like to ask of the Witness?

MR. SCHWENKE: No.

MR. WALLACE: All right. You may step down.

Now, let me just as~ if we--maybe it will save a Little bit of time if we can stipulate that two checks were issued by Western Insurance Company, one for $27,847.88 and one for $13,381.88 is that correct?

MR. SMITH: That's correct

MR. SCHWENKE: I'll stipulate to--

MR. WALLACE: You'll stipulate to those--

MR. SCHWENKE: --whatever the

amounts--yeah

MR. WALLACE: --whatever the amounts were. In the complaint, by the way, Mr. Smith, I found a--in the complaint, it indicates 82--the sum of the four checks is $82,359.52, I think they really add up to $82,459.52. And at any rate--

MR. SMITH: Okay. We--whatever the arithmetic shows.

MR. WALLACE: All right. Mr. Smith, your next witness?

MR. SMITH: Mr. King.

66

SAMUEL KING, called as a witness by and on behalf of the Bar Council in this matter, after having been first duly sworn, was examined and testified as public.

DIRECT EXAMINATION BY

MR. SMITH:

Q State your name for the record, sir.

A Samuel King.

Q And your occupation?

A Lawyer.

Q And your business address, please?

A 2120 South 13th East, Salt Lake City, Utah 84106.

(Inaudible)

Q And what's your relationship to this matter now before this hearing panel?

A I'm the attorney for Mrs. Sur.

Q All right, sir. I'm going to hand you what's been marked as Exhibit 3 in this proceeding and ask if you can identify that for me, please?

MR. WALLACE: What are you looking for?

MR. SMITH: For the (inaudible)

MR. WALLACE: I don't have it, I've never seen it.

(Inaudible)

Q (By Mr. Smith) Now, here it is; the first document is a stipulation and order signed by--this

stipulation is signed by--or the order is signed by Judge Rokich, October 6th, 1989. Tell me, what were the proceedings which precipitated and resulted in this order, can you tell us about that, please?

A We had a pre-trial conference--excuse me, we had a trial on September 19th that Mr. Schwenke was present at, pro se. I was present. Rather than try the case, we worked out a stipulation which

we read into the records.

Q Who were the parties to that stipulation?

A Mrs. Sur, Mr. Schwenke, myself, and my associate, Ken (inaudible)

Q Okay. And this Bruce Udall wasn't involved?

A No.

Q And I'm also going to hand you before you go further, what has been marked as Exhibit 4 and ask you if you can just identify that for the record, please?

A This is a stipulation and order I received in the mail from Mr. Schwenke.

Q Okay. What's the difference between Exhibit 3 and Exhibit 4? They both have the same title, do they not?

A They do.

Q Same document?

A On Exhibit 4, Mr. Schwenke has deleted some of the terms.

Q Okay. You received this--this document then

before you in the mail directly from Mr. Schwenke?

A Yes.

Q And does it bear a signature?

A A. Paul Schwenke.

Q Okay. And what's been deleted?

MR. SCHWENKE: Excuse me. I don't have No. 4.

MR. WALLACE: Yeah, I'm wondering if we could--

MR SMITH: What we ought to do is to have some copies made.

MR. WALLACE: I'm wondering if we could take and 11 have some copies made so we could all see it.

MR. SMITH: Okay.

MR. WALLACE: If that would be appropriate.

Do you have something else you could go ahead with him?

MR. SMITH: If we could talk about the original, while she's gone.

Q (By Mr. Smith) Let's go back to Exhibit 3. Was that Exhibit 3 made a copy of the Court record as it currently exists or was it changed in some way?

A Because Mr. Schwenke changed the terms of the stipulation read into the record at the time of trial--

MR. SCHWENKE: I object. I mean, this

is just his conclusion of what the stipulation was read in the Court. I mean, I obviously disagree with the stipulation in

--in that matter, and secondly, I think if he's--if Bar Council has these witnesses here, all these matters from other proceedings I believe should not be used here, if he's got his witnesses, he may put on his case, put on his witnesses instead of relying on matters of another proceeding.

MR. WALLACE: Okay. I'm going to overr--well, I'm going to sustain the objection and ask us to lay a little further foundation as to how

MR. SMITH: Okay.

MR. WALLACE: --the witness may know that Mr. Schwenke agreed, if he did, to the

stipulation, what was read in the Court, under what circumstances, whether Mr. Schwenke was there, that kind of thing.

MR. SMITH: Very good.

Q (By Mr. Smith) Was Mr. Schwenke present when the stipulation was read into the record?

A Yes.

Q Did he agree to it?

A Yes.

Q Did he have--voice any objection whatsoever to the stipulation? A The stipulation was the result of a great deal of negotiation, once negotiated (inaudible)

Q This is--this stipulation you're referring to now

is Exhibit 3?

MR. WALLACE: Well, let me go back a minute. 3 What was read into the Court? Was it Exhibit 3 or was it 4 Exhibit 4 as modified by Mr. Schwenke?

THE WITNESS: It was Exhibit 3.

MR. SCHWENKE: If I may respond to that. This is his view of what was read to the Court.

MR. WALLACE: Right. And that's all we can do is, with each witness, take this witness' own view, and you can certainly take--be sworn and give your view of what the matters are at an appropriate time but we recognize that this is his view of what happened.

MR. SCHWENKE: That's correct, and this was not read into the record in the Court as the stipulation, this document.

MR. WALLACE: Okay. We will allow you to take the stand and testify that it wasn't read in and what went on, but we--we've got to hear what his evidence is and testimony and then we'll hear yours, also, even though you may disagree with it. All right. You may proceed, Mr. Smith. MR. SMITH: All right.

Q (By Mr. Smith) So, Exhibit--so your testimony the this is Exhibit 3 was the stipulation between you and Mr. Schwenke?

A The stipulation was written after I let the Court

look at the files and dictated it; but it was, to my knowledge, a faithful restatement of the verbal stipulation.

Q And the two documents you have in your hand, if I could refer to those to substantiate what I'm saying.

MR. WALLACE: Okay. So let's back up a minute. You stated some stipulation on the record in front of Judge Rokich with Mr. Schwenke present; is that correct?

THE WITNESS: That's correct.

MR. WALLACE: After whatever stipulation was orally stated on-the record, you went back to your office and attempted to faithfully recount what that oral statement was in Court; is that correct?

THE WITNESS: That's correct.

MR. WALLACE: So, this isn't word for word

what was stipulated to in Court? By this, I mean Exhibit 3.

THE WITNESS: Correct.

MR. WALLACE: All right. Then after Exhibit 3 was created by you, you sent a copy of that to Mr. Schwenke?

THE WITNESS: That's correct.

MR. WALLACE: And then you received back in the mail Exhibit 4, which had some modifications and changes; is that correct?

ThE WITNESS: That's correct.

MR. WALLACE: Alright. Go ahead.

MR. SCHWENKE: With my signature.

MR. WALLACE: With--with Mr. Schwenke's signature?

MR. SMITH: Mr. Schwenke then is acknowledging

that that is his signature on Exhibit 4?

MR. SCHWENKE: That's correct.

MR. SMITH: Okay. That's fine. Because both exhibits have the language that I want in them--in the record so I would offer both of those exhibits with those qualifications as outlined by--

MR. WALLACE: We'll receive Exhibits 3 and

(By Mr. Smith) All right. So both the--both of the exhibits, let me draw your attention, Mr. King, to Exhibit 4, which is the one that Mr. Schwenke indicates is the more correct of the two exhibits.

A Uh huh (affirmative)

Q And on Page 4, I guess I'll call if the first full paragraph, starts out! "Such judgment"; what does that say?

MR. WALLACE: Where are we? At Page 4? I

think we can read what it says.

MR. SMITH: Okay. Thank you.

MR. WALLACE: This is the best evidence. He doesn't have to testify to it.

MR. KING: On Page 4 and on Page--

MR. SMITH: No, that's all right. We--it's been drawn to the attention of the panel, and I just wanted to

indicate the wording of that stipulation to the panel.

MR. WALLACE: And which paragraph do you want us to specifically this to?

MR. SMITH: Well, Paragraph 4 on Exhibit 4, read the language there indicating the basis upon which the 6 judgment was based.

MR. WALLACE: Now, you mean Paragraph--

MR. SMITH; It's in Paragraph 9 on-- 9

MR. WALLACE: Paragraph 9 on Page 4 to

MR. SMITH: --Page 4.

MR. WALLACE: Well, wait--mine's three pages, three and four are inverted, and so--

THE WITNESS: And similar language in Paragraph 3, Page 2.

MR. SCHWENKE: May--may I re--make a comment?

MR. WALLACE: Yes, Mr. Schwenke.

MR. SCHWENKE: By way of objection? The civil matter and the settlement arising to, as far as the amount, I--no bearing whatsoever on the actual settlement of the claim to Mrs. Sur--

MR. WALLACE: Mr. Schwenke, what I think we ought to have you do is bring that out on cross-examination and I'll let you ask him questions about that, how this amount

was derived and how they--that matter may differ and why it doesn't bear a relationship to the amounts brought out in

I the insurance, and I'll allow allow you to testify about that and we'll also allow you to argue that.

MR. SCHWENKE: Well, I--I think you're missing my--my-

MR. WALLACE: Go ahead and state--continue, I didn't mean to cut you off.

MR. SCHWENKE: --my point. I think that this obviously was a settlement and--and I believe we--we do have rules with respect to settlement and so forth and disclosure of those settlements; but settlements in--as reflected here as the amount as admitted to in counsel here and the amount of the

settlement are two different amounts. There were settlements derived for totally different purposes and it's not--not in any way relevant to the facts that they have the burden to put forth here, which are the facts of the alleged amount that was actually supposed to have been received and the amount that was received and so forth. And this settlement was con--a totally different and separate proceedings arrived at for a totall different consideration, it's not relevant.

MR. WALLACE: All right. Let me, and your--the objection is lack of relevance, and also that the matters concern offers of compromise and settlement which are inadmissible under the Rules of evidence; is that your objection?

MR SCHWENKE Yes. Sir

MR. WALLACE: All right. Concerning the offers of compromise and settlement, I believe the language, although I don't have it here with me, really deals with offers of settlement and settlement negotiations, not actually settlements arrived at. As far as lack of relevance, I don't think we have enough information to determine at this time whether it's relevant. What you say may be true and I'll allow you to go into that on cross-examination and also argue that, but right now, we'll hear what this element has to do with it and find out if it has any relevance. If it doesn't, we'll disregard it, Mr. Schwenke.

MR. SCHWENKE: Thank you.

Q (By Mr. Smith) Okay. Tell me, sir,

this settlement was in the amount of how much was the dollar amount of the settlement?

A 87,000.

Q And why did--what was the basis upon which this action was brought against the--Mr. Schwenke? Did it have anything to do with the case we're hearing here today?

A Mr. Schwenke's fee at 28% would have been roughly 25,000; instead, he kept everything except the money that Mrs. Sur has previously described.

Q In other words--so, what did this judgment represent?

A It represented a judgment against Mr. Schwenke 4 for fraud from professional-5

Q Arisins out of what?

A Arising out of his misrepresentation of his client (inaudible)

MR. WALLACE: Well, let me--let me ask this. Tell us everything you knew about why--let's see, where is the amount? Looking at Exhibit 4. Tell me what you know about the amount of the settlement and how that was negotiated, and what, to your knowledge, that represents; just a dollar amount, what is that dollar amount? How was it arrived at, if you know?

THE WITNESS: I'm sorry. Would you restate that question? I don't know what you mean.

MR. WALLACE: All right. Exhibit 4 represents a stipulation and order, and the stipulation has to do with certain amounts to be paid, or that a judgment may be entered with respec t to I is that correct?

THE WITNESS: That's correct.

MR. WALLACE: How were those amounts arrived at and what do they represent, to your knowledge?

THE WITNESS: The $100,000 was arrived at as a compromise. Mr. Schwenke-

MR. WALLACE: Compromise of what?

THE WITNESS: Of Mrs. Sur's claim against 3 Mr. Schwenke.

MR. WALLACE: Which was what? Was this a ma practice claim, was this a property damage claim that has has nothing to do with this? Or was it a-

THE WITNESS: It was a legal malpractice action.

MR. WALLACE: All right. And the 100,000 was some type of a compromise?

THE WITNESS: Uh huh (affirmative).

MR. WALLACE: All right.

Q (By Mr. Smith) And--and what were the facts upon which the malpractice action was based?

A At the pre-trial conference in the case, I had George Throckmorton, probably the State's most reputable 16 handwriting examiner, this is through conference with the Court and with Counsel, we were attempting to see if we could resolve the case at pre-trial. Mr. Throckmorton was present, his testimony was that Mrs. Sur's signature on the second two checks were forgeries. Mr.-

MR. WALLACE: Well, did this actually go to a hearing? A trial? I'm confused a little bit; I thought this was a settlement prior to trial.

THE WITNESS: We settled on the day of trial, at

I the pre-trial conference, shortly before. We had our handwriting expert present and so did Mr. Schwenke's have his opposing handwriting present--expert present.

MR. WALLACE: And those two witnesses were sworn and testified?

THE WITNESS: They did not; but they did report to the Court that--in a proffer, Mr. Throckmorton had said that h e had talked to her expert--

MR. SMITH: Just a moment, I can give you that name.

MR. WALLACE: Well, let--I think we're getting a little bit a field here. The

question to you, or. King, the question to you was, what were the grounds for the mal practice suit? What did it arise out of?

Q (By Mr. Smith) Did it have anything to do with Mr-

MR. WALLACE: Don't lead him. I want to--

MR. SMITH: Okay.

THE WITNESS: Mr. Schwenke forged Mrs. Sur's signature to the second two checks totally $47,000.

MR. WALLACE: That was an allegation in the malpractice complaint?

THE WITNESS: Right.

MR. WALLACE: And the sec--the other two checks are the two checks from Colonial Penn Insurance Company?

THE WITNESS: She did endorse those

MR. WALLACE: All right.

THE WITNESS: And she received the money that she's indicated Now, the second major part of the claim, and Mr. Schwenke's admitted this himself, it's on the documents that he's submitted to the Court; both defendants had $100,000 liability coverage. And liability was so clear, and already, she had 11,000 in medical, and the insurance files also reflected that Dr. Watkins has a national reputation for quality; that they were both prepared to pay out the full $100,000 benefit.

MR. WALLACE: What evidence do you have that the two insurance companies were ready prior to the settlement negotiated by Mr. Schwenke, to pay out their full limits?

THE WITNESS: Well, insurance company memorandum that Mr. Schwenke delivered to the District Court, plus the insurance company--

MR WALLACE: There were two memoranda I is that correct?

THE WITNESS: Uh huh (affirmative)

MR. WALLACE: One from the Western Fire and one from Colonial Penn?

THE WITNESS: One from one company, we're referring to conversation with the adjustor for the other

So there was $200,000 available, we claimed.

MR. WALLACE: All right. That was your claim that there was that available it was also your claim that the insurance companies prior-to the settlement negotiation, they were ready, willing and able to pay out

$200,000; is that what you're saying?

THE WITNESS: They would have made a report from Dr. Watkins. Mr. Schwenke at this time, again he claimed, was having severe financial difficulty (inaudible) rather than waiting for Karyn to return from Los Angeles with a report from Dr. Watkins, he settled promptly, he gave himself essentially the same thing he would have had-

MR. WALLACE: That again was your allegation in the malpractice case?

THE WITNESS: Malpractice case, that's right.

MR . WALLACE: Okay.

MR. WILKINS: Excuse me.

THE WITNESS: The difference being that she received about 120,000 less.

Q (By Mr. Smith) But the bottom line is

that this settlement, this Exhibit 4 was based upon Mr. Schwenke's representation of your client, Karyn Sur, in connection with this automobile accident that she previously testified about; is that correct?

A Yes.

MR. WALLACE: Now, I'm a little bit confused. You said she did negotiate, endorse the two Colonial Penn checks?

THE WITNESS: Mr. Schwenke gave her the checks she claims, and she signed them at his office and didn't see them again.

MR. WALLACE: All right. Now what about the two Western Fire checks?

THE WITNESS: She never saw them, was never aware of them, didn't know any--didn't-

MR. WALLACE: Okay. That was part of

your allegations in the complaint?

THE WITNESS: Right.

If I might clarify that, I think this would save some time. Mr. Schwenke has deni--has denied, all through this, that she was unaware, he said that she went to the bank with her, identified herself to the bank officer, and that she signed both those checks. This is where the handwriting experts become important, because hers and his both said her signatures had been forged, so she didn't go to the bank. So then he did take all that money and put it in his own account and didn't share a penny of it with Mr. Udall, nor with her.

And we had all this evidence prepared to establish at trial.

MR. WALLACE: Mr. Smith?

MR. SCHWENKE: I have objection to all this line, like I say, this evidence, (inaudible) for this panel to consider, but not the representations of counsel. Obviously you know, we didn't--I haven't agreed to those, or denied all of those allegations in that proceedings, and if the- if the Court would allow the testimony as to the stipulation I think the panel is going way beyond that stipulation by having him testify as to these allegations that were unproven, has not been proved.

MR. WALLACE: Mr. Smith, what do you say to the objection?

MR. SMITH: No. No, my--my only point is--the only thing I wanted to do with this witness was to enter this--these Exhibits 3

and 4 and the basis for these exhibits, indicating that these were his stipulation, in which this respondent believed and admitted on the record that this did occur, the basis of why it occurred and that it was based on the law.

MR. WALLACE: The last statement of the witness, which I don't think was really responsive to a question will be stricken.

MR. SCHWENKE: Thank you.

MR. SMITH: Thank you. I have no further questions.

MR. WALLACE: No further questions.

Mr. Schwenke, your cross-examination?

CROSS EXAMINATION

BY MR. SCHWENKE

Q Now, just one question, Mr.

King. Don't you think if there was more money to be gotten from the insurance company that more money would have been received? I mean, more money would have been demanded and received? Yes or no.

A As far as Mrs. Sur is concerned, over $100,000 more money would have been received. As far as you were concerned, you received virtually the same money--

MR. SCHWENKE: Objection, non-responsive.

THE WITNESS: --you would have received on a 15 percent fee, and you had the advantage of having it in your hand.

MR. WALLACE: Objection's overruled. That may have been responsive.

Go ahead and ask further questions to clarify if that wasn't what you really wanted

to get into.

Q (By Mr. Schwenke) The total of the four checks that were alleged to have been part of this settlement that's reflected in the complaint, formal complaint, Paragraph 20, which states that the 82,000, with the correction by Mr. Wallace; 459.52; do you disagree with that

amount, that that's the total amount that was received for the settlement?

The total was approximately $82,000. Is that the question?

MR. WALLACE: That was the question. Although Mr. Schwenke was more precise and had the full total.

THE WITNESS: If that's--yes, I'll agree.

Q (By Mr. Schwenke) And the civil matter that you filed on behalf of Mrs. Sur against me, alleged a mis-representation cause of action; is that correct?

A Can I get that? It'll only take a second.

Yes. It did have that cause of action.

Q Now, isn't it a fact that the $100,000 was simply an amount arrived at just to settle the matter, was not base on anything other than that was at the time an amount arrived at to settle, but not based on any amount that was received and not--and owed to your client; is that correct?

A That $100,000 was based on several factors. We felt that you owed her over $100,000 if you'd prosecuted her claim and got a full settlement. With $100,000, that

she would have enough money to have the necessary surgery. We didn't think that if we got a judgment for the full amount, loss of earnings, delay and so forth, that you would pay that. We reduced our claim by hundreds of thousands of dollars to 100,000. hoping you would pay that figure.

MR. SCHWENKE: Okay. No more questions.

MR. WALLACE: Mr. Smith?

MR. SMITH: No questions.

MR. WALLACE: You may step down.

THE WITNESS Thank you

MR. SMITH: We have nothing further to offer in the Karyn Sur matter, we're ready to present evidence on the other matter if you want to take--

MR. WALLACE: he'll, let's take a brief--let's take five minutes, is that all right? I hate to delay people too much longer; but let's have a little break.

(Off the record.)

MR. WALLACE: We're back on the record in the matters of the two complaints against A. Paul Schwenke.

Mr. Smith, you may proceed.

MR. SMITH: Thank you, sir.

I think--Mr. Schwenke indicated to me during the break that he might be willing to stipulate to some of the matters in F-478 that might--to streamline the situation just a little bit. I recognize, of course, we have a default, and that the matters set forth in the formal complaint are deemed to be true, and the matters that we're

simply putting on the record were simply by way of making the record, and to establish the injury and the harm that had occurred to the--to his former clients. I was going to

offer into evidence the exhibits pertaining to the altered checks. I think Mr. cS cih wde nnk e i s willing to stipulate to that, in which case, all I'd have to do then is call Mr. Wade regarding the injury that he suffered.

MR. WALLACE: Mr. Schwenke?

MR. SCHWENKE: Yes. I--what I asked counsel is I feel somewhat constrained in this matter because of the pending criminal matter, and--

MR. WALLACE: Okay. Let

me--let's--things are starting to, you know, be a little clearer to me now. There is a criminal complaint pending against you, is that right, Mr. Schwenke?

MR. SCHWENKE: I was arraigned by the criminal prosecution--

MR. WALLACE: And does that arise out of the matters with regard to Mr. Wade?

MR. SCHWENKE: With the Wade matter.

MR. WALLACE: All right. And of course, you have an absolute right to remain silent and not give any evidence which might be used in any criminal proceeding, and you understand that?

MR. SCHWENKE: Well, that's correct.

MR. WALLACE: And anything you say here is not privileged in any fashion and could be used in the criminal proceeding. That does

put Mr. Schwenke at a little bit of a disadvantage with respect to putting on evidence.

MR. SMITH: What we could do is this, is--like I say, since the matters are--are admitted and in default, I could just simply put on Mr. Wade to testify strictly in the area of the harm that's come to him as a result, and we could--without going into these other matters, the checks, because there's--they're on the record as to what they were, what happened, and default's been entered on

the--on the allegations set forth in the formal complaint, let's see, this formal complaint is--what number-

MR. WALLACE: Well, put on what evidence you want to put on, Mr. Smith, and we'll see

what we may need-

MR. WILKINS: Could we have a little conversation?

MR. WALLACE: Yeah, maybe we should--maybe we should--let's have a little break and let us discuss a few things at this time.

MR. SMITH: Okay. All right.

(Off the record.)

MR. SCHWENKE: --just, sir, since I make the motion already and you were going to consider it after all the evidence is in, I again ask that perhaps it might be helpful if the response, for purposes of mitigation or what not, to be, you know, reset for another time.

MR. WALLACE: All right. Thank you.

(Off the record.)

MR. WALLACE We have the two formal complaints. Both formal complaints have--have been defaulted, we recognize that default.

Under the rules, it indicates that when there's a default, we then should assume that the allegations in the complaint are true. A hearing would then be held on what the appropriate discipline should be.

I'm assuming then, and the question is, what discipline should be resolved from the complaint, and with regard to that discipline, I assume that we should receive evidence of aggravation, evidence of mitigation.

Mr. Schwenke is in a--is in a very bad position to take the stand with respect to

the Wade matter with respect to mitigation. We can't see how he can get on the stand and say, for example, okay, I-I-- -the allegations are admitted; however, I had some proper reason for doing this, or I had something else in mind, that I intended to do something and it didn't work out and I never had sufficient intent to do these types of things; he just can't speak to that issue, or he may well say something to incriminate himself.

It's our feelings, with extreme apologies to the witnesses who are here with respect to the Wade matter, but we don't think we will proceed on the hearing on mitigation

and aggravation in the Wade matter, because it wouldn't be a valid hearing, we would

hear one side.

We intend to take--have Mr. Schwenke take the stand, if he wants, or present a defense with respect to the Sur matter, and determine our recommendation of the discipline with respect to the Sur matter. And if we heard the Wade matters, even though we think we could, you know, put it off to the side and not consider it, we may be in the future, subject to some criticism because we heard one half of the Wade matter and then went ahead and decided the discipline on the Sur matter.

So at this time, and again with apologies to the witnesses you have here, Mr. Smith, on the Wade matter, we think it would be appropriate to continue the hearing on the Wade matter until after the criminal

complaint is resolved, but we intend to fully hear and litigation the Schwenke matter today and try to come to some resolution on the Schwenke matter today.

MR. SMITH: You mean the Sur matter?

Mr. WALLACE: I mean the Sur matter.

MR. SMITH: Uh huh (affirmative).

MR. WALLACE: Excuse me, the Sur matter today.

MR. SMITH: All right.

MR. WALLACE: And so that's where we are.

MR. SMITH: All right, sir.

MR. WALLACE: Do you have anything else to present on the Sur matter at this time?

MR. SMITH: Only by--if you're talking by way of extenuation, mitigation, aggravation, we believe that the prior

disciplinary activities can be considered as an aggravation, and so we would offer his prior disciplinary record or your consideration.

MR. WALLACE: All right. In what form are you going to offer that?

MR. SMITH: We have--I have copies here of findings and facts, conclusions of law and recommendations and order of discipline entered in prior matters that are concluded, and would offer those. And we have the originals these are copies, however, I have the original files here.

What I just gave you was that which we've had marked as an exhibit, and it represents the action in F-281.

MR. WALLACE: All right. It' 5 not marked as an exhibit number?

MR. SMITH: No, it's not marked.

MR. WALLACE: Let's have that marked as Exhibit 6 if we may.

We now have received Exhibit 6 which is in the matter of the complaint of Kirt--Kirk Heaton against A. Paul Schwenke, F-281.

Have you received a copy of those findings and

conclusions, Mr. Schwenke?

MR. SCHWENKE: I have.

MR. WALLACE: Just now?

MR. SCHWENKE: I just have, now.

MR WALLACE: Do you have an objection to our receiving those on the issue of aggravation?

MR. SCHWENKE: Yes. This was the matter that I referred to in my opening statement

that was decided in August, 1990, by way of a motion for sanctions, for discovery, sanctions, and this was the matter I specifically instructed Mr. Johnson to be in contact with to make sure, because I was--intended to file an appeal on it.

This matter, however, was not presented to the Supreme Court until seven months later, in March of 1971 (sic) and the Supreme Court without objections entered that, so my--my objection's basically on--based on the fact that this .matter was not properly served wherein I could then file my--my appeal to. And this matter as now--I'm filing a motion with the Supreme Court to set this matter aside based on the fact that this seven months for the Bar to do something where they didn't, and when they finally did

something, I--you know, I wasn't here, and I wasn't personally served, I believe, according to the rules.

And I paid for that. If it is to be considered by the panel, if in the long run, the Supreme Court might

rule against it.

MR. WALLACE: Let me ask you, there's--the last two pages of Exhibit 6 are the order of discipline of suspension signed by the five Justices of the Utah Supreme Court; do you have an objection also that we receive that two-page document?

MR. SCHWENKE: No No

MR. WALLACE I am--we're going to allow the document to be received as Exhibit 6, based upon the fact that I don't think we, in

this panel, should go behind the--try to second guess what another panel did, we don't have enough time here to try the issue of whether or not this was appropriate entered. On the face of the matter, it is signed by the chair of the disciplinary hearing panel, and that is--forms--the findings and conclusions form the basis of the order of discipline of suspension of the Utah Supreme Court, and we will receive that, not look behind it to whether or not it was appropriately entered. That will give you other remedies to try to handle that matter.

MR. SMITH: And the same, may we offer the next exhibit in order, Exhibit 7, which is the same documents pertaining to F-241? It's the findings of fact, conclusions of law and order of discipline entered by the

Supreme Court in the previous matter.

MR. WALLACE: Have you just received a copy of those findings and conclusions-

MR. SCHWENKE: Yes. I-

MR. WALLACE: --which are now marked Exhibit 7, Mr. Schwenke?

MR. SCHWENKE: I have now received them.

MR. WALLACE: Do you have an objection to the receipt of that into evidence?

MR. SCHWENKE: No. Not to No. 7.

MR.WALLACE: All right.

MR. SMITH: We have no further evidence to offer in regard to the Sur matter, subject to rebuttal, of course, should Mr. Schwenke decide to; but enter any matters in regard to Mr,--to the Sur--

MR. WALLACE: All right. I might--I

might indicate that-those who are here on the Wade matter certainly are welcome to remain, but they may leave if they desire and that's up to them, but we again apologize for any inconvenience, but we appreciate the interest that the witnesses may have in trying to help come to the bottom of whether or not attorneys should be disciplined. It's a time consuming effort and we appreciate the public service in appearing, you're welcome to stay or leave.

Mr. Schwenke, we're now going to turn to you and ask for any mitigating evidence you'd like to present in the

sur matter alone, we will not hear anything with respect to the Wade matter because

of the pending criminal charges.

MR . SCHWENKE: Okay. If I may be sworn?

MR. WALLACE: Yes.

A. PAUL SCHWENKE,

the respondent herein, after having been first duly sworn, was examined and testified in his own behalf as follows:

DIRECT TESTIMONY

MR. SCHWENKE: If I may begin to stating what I believe was determined in the criminal prosecution of this same matter.

MR. WALLACE: Now, I want you to keep one thing in mind, Mr. Schwenke, just for your benefit; maybe I'm just speaking for me and not for the other panel members. You mentioned that, of course, the burden of proof is different in a criminal matter, the burden of proof here is lower than there.

There are also some issues that you may want to address that are a little bit different from the criminal matter. In the criminal matter, perhaps, I don't know, but perhaps there were allegations of fraud and that you had to intentionally take the money of a person and knowingly use it for your own purposes, or whatever the elements are.

In this matter, there are allegations that as a lawyer, you may have a duty to very carefully monitor or keep

track of funds, and that theoretically, we could find that you had not carefully monitored and kept track of funds of a client, even though you may not have had criminal intent.

What I'm trying to say is, I want you to

be sure that it's clear in your mind that there are issues different from the criminal matter that you may want to address.

MR. SCHWENKE: Thank you, I--I think I'm aware of that.

MR. WALLACE: Good.

MR. SCHWENKE: I believe what I merely was going to state here are some of the factual issues which was raised by the testimonies.

Number one, I believe a critical issue was that the allegation that I--I forged the signature of Mrs. Sur on two checks; well, I denied that at the criminal case, and I believe that the denial there is also important here. And evidence with respect to that denial, the government put on Mr. Throckmorton, I believe is his name, alleged

expert in the field, to show that the signature were forged.

On the other hand, the evidence that was presented on my behalf, the bank officer corroborated my story that I went and got the--when I received the checks from Colonial Penn, I went to Mrs. Sur and took her with me to the bank to have those checks endorsed and put it in the Schwenke and Udall account. And that's where the--the

proceeds went, and that, I--I believe, even though the assertions continue to come up, I believe there was no--no need for the bank officer to go in there and perjure himself he was there to testify that things exactly happened as I have been asserting all along.

MR. WALLACE: Let me interrupt you just a minute to clear up one thing.

We've Had evidence of--that's been a little confusion, some witness said that it was the Colonial Penn checks which were the ones that were not endorsed and someone else said it was the Western Fire. It's your understanding that the Western Fire were the ones--were clearly endorsed?

MR. SCHWENKE: The--the Western Fire checks were presented to me before we--I met with my client and discuss the settlement, and then had her endorse those.

MR. WALLACE: And those are the ones that she acknowledges she endorsed; is that right?

MR. SCHWENKE: That's correct, yes.

MR. WALLACE: So the disputed ones are

the Colonial Penn checks?

MR. SCHWENKE: The disputed one are Colonial Penn but I--

MR. WALLACE: All right. I just wanted to clear that up.

MR. SCHWENKE: --I understand because I believe I heard Mr. King stated otherwise.

MR. WALLACE: That's--he did.

MR. SCHWENKE: But the Colonial Penn were mailed to our office and upon receipt of those, I again went and got Mrs. Sur to endorse those and we presented those to the bank.

The other circumstance that--other factual--that I believe is relevant here is the disposition of the checks, and my explanation at that--at that trial of what

happened to the check; I'm at a disadvantage here because I don't have that in--that file or the transcript, the transcript is available, I believe Bar Council have the transcript of the trial, but the assertion from my--or despite events, was we agreed to putting all this money into a trucking company that they, Mrs. Sur and Karyn--Mr. and Mrs. Sur had at the time, and--and it was clearly shown that the monies would flow into that trucking company.

The trucking company subsequently went under and at that point, when, you know, when the allegations was brought that the money was used prop--improperly.

The annuity, I believe the evidence is clear, we--we, you know, we made those payments, and the allegations that the

payments came from Colonial Penn, I don't think is substantiated in the--in the trial. The Colon--the--the

payments came from us, Schwenke and Udall, it was our check, issued to them every--every month. So, I--I think the--the charge basically that we mis--we misused the funds and whatnot, it--it's not totally true; however, we--I can't take away the fact that when the trucking company went under and Karyn and her husband no longer have any source of income, we lost everything; they've lost and we've lost because we--we--our portion of the fees that came in, which we believe we made clear at the time of the settlement went into the trucking company.

And that so with the loss of the trucking company that they operated and ran and collected the funds and operate for, like six months, collected a salary for themselves on it, and when it went under, there went their settlement and there also went our portion of the--of the funds that we collected.

If we--and--and again, I think this was in '85, I was admitted in '83, a couple years into and perhaps this was the first major settlement I ever rece--ever--well, it was the major settlement ever received. In visiting with other counsel since then, there's ways that it probably could have been handled, where there would be absolutely no question that the settlement was handled properly.

I would admit to this panel that we probably didn't follow what--what all lawyers would follow in making

those settlements in--in--in making sure theorized absolutely no questions after the fact that there was any problems with the settlement; but as far as the flow of any funds that was used, no funds actually went personally into my account, in fact, I didn't have any personal account, the monies went into Schwenke & Udall account, and if--if--when they were asserting the same claim against Mr. Udall, they were claiming that Udall signed all the checks out of that account, and that's a fact. Seldom I ever see any checks in--in this--or ever signed any checks in the--in the--in the Schwenke &

Udall account.

So, even though I--I have a hard time admitting that there was any fraud, any impropriety, I will for purposes here today, and asking for your--for mitigation, admit that the way lawyers handle the matter was probably where there would be absolutely no complaint after the fact, it's not the way we handled it. We--we--we got involved with the client, wherein the client say, well, you know, the settlement's coming, we've got money coming, we've got this business that we--we were in, we've been in for 20 years, we know we can make all of us a lot of money. Put it in there, we guarantee we're going to make a lot of money for all of us; and the funds was traced penny by penny in that criminal trial, went into that business

and--and then the business went under, and so anyhow, I--I merely want to state that--that that wheeze the case, I had no intention, I know intent is not needed here, but I don't believe that we went out to hurt anybody, or I went out to hurt or cause any grievous harm to this lady. I--I never did. Thank you.

MR. WALLACE: Okay. I have a few questions. One, in addition to the four checks, was it your understanding that the insurance companies had paid approximately $11,179.96 of Mrs. Sur's medical bills? In addition to the four checks.

MR. SCHWENKE: With--with the four checks there, the insurance company was to pay all medicals, all medicals,- and whatever that amounted to.

MR. WALLACE: Up to the time of the settlement.

MR. SCHWENKE: No. Even after the settlement; the insurance company was left to pay all of medicals incurred on the--as a matter of fact, I think her testimony was that after the fact, she went to California, and I believe we were pursuing the further--the further treatment for her, because the insurance company committed to pay all medicals.

MR. WALLACE: Do you have any written document from the insurance company indicating that they would pay all future medicals related to her back?

MR. SCHWENKE: We have settlement agreement

wherein the insurance company agrees to pay all medical expenses incurred, and that settlement agreement is there in the--in the files, either in our file, or they would--the client would have that settlement, because she signed it off.

MR. WALLACE: Okay. What happened to the proceeds of the two Colonial Penn checks? I believe you said they went into the account of Schwenke & Udall; is that correct?

MR. SCHWENKE: I--that's right.

MR. WALLACE: All right. Now, was that a general account or a trust account?

MR. SCHWENKE: I don't recall right now. I-- most likely, it would be the--I don't know, can't say for sure We had two accounts the trust account and the general

account.

MR. WALLACE: Out of that--those two checks, which I believe total 42,000-something--$41,229.76, what-- where did the $41,000 go?

MR. SCHWENKE: If I may refer to the record on the criminal case, 'cause it sets out there. I don't recall exactly offhand how that was--

MR. WALLACE: Did you--did you take any of that for your own fees?

MR. SCHWENKE: I believe there was--I don~t know

for sure right out of that 42,000, but I believe that around that time, there was checks written to me by Mr. Udall off that account.

MR. WALLACE: What was your understanding of your--the fee that you had due as a result of the settlement of the Sur matter?

MR. SCHWENKE: We had a one-third agreement signed; however, we also had a 28~ agreement that is floating around; I don't know exactly what the origin of that, because that was presented by the--them.

MR. WALLACE: So, it was either 28% or 33-1/3.

MR. SCHWENKE: Or 33-1/3. But we do have a 33-1/3 agreement that was admitted, and it was signed by Karyn Sur.

MR. WALLACE: Do I understand your testimony that out of this $41,000 that was put in the Schwenke & Udall account that a portion of that or all of that was paid out

to a trucking company owned or operated by Mrs. Sur?

MR. SCHWENKE: Most of that was paid to the trucking company.

MR. WALLACE: At whose request?

MR. SCHWENKE: Well, we've already had a truck-- we'd already entered an agreement for the trucking company and the agreement--and we've started trucking company and the money was intended, when it arrived, was to go--I mean

for the settlement, was to go into the trucking company.

MR. WALLACE: And you don't know how much of the 41,200 and whatever went into the trucking company?

MR. SCHWENKE: I--I can't state that

right now but the information is there, is available.

MR. WALLACE: And did you have an understanding with Mrs. Sur that an annuity would be purchased to pay her $250 per month for the rest of her life?

MR. SCHWENKE: That's correct. We, at the time of the settlement, when they were in the office, we also had a--somebody from Prudential in the office to sign up on the annuity, which we all expected to cost much less than what it eventually came out to be. I think we--and--going to my memory here, but I think it was--the insurance man proposed the annuity for $28,000, but then a few months later--or not--a few weeks later, he came back with the-- with the documents, and asking for substantially more than

$30,000. And it was that time when Karyn Sur, I believe, was advised that if she wants to continue, we can--we can pay her the money and not buy the annuity, because it was more than what we expected initially. And--

MR. WALLACE: And it's your testimony that she knew then that there was no annuity going to be purchased and that you were just going to make $250 a month payments to her until the money ran out or something like that?

MR. SCHWENKE: I--I cannot say that I--it's my testimony that she knew then, 'cause she was very adamant 3 she did not; but I believe she knew then that we were going to keep--pay her the money out of

Schwenke & Udall.

MR. WALLACE: Why did payments cease after either $4,500 or $6,000 of these $250 a month payments?

MR. SCHWENKE: I don't quite remember exactly what transpired, 'cause I--oh, I believe we had a demand from Mr. Hawkes to pay an extraordinary amount of money; 150,000 or something like that, and from that point, I refused to pay and they then went to the county prosecutor, this matt-- and the criminal prosecution then proceeded.

MR. WALLACE: I'm sorry. I'm kind of speaking out of order. I forgot this should be Mr. Smith's opportunity to ask questions and I would ask a few when he's finished. I'm sorry.

MR. SMITH: That's quite all right,

Counselor.

MR. WALLACE: You go ahead, and if I have others after, we'll ask if any of the panel members have others after, we'll ask them I I'm sorry. You should have gone ahead of us.

MR. SMITH: Well, I just was going to ask him the same questions you were asking, and so we're moving right along.

CROSS-EXAMINATION

BY MR. SMITH:

Q But you do not deny, do you, Mr. Schwenke, that you entered into a stipulation with your former client, Karyn Sur, to settle this matter in the civil case?

A I do deny that I entered this--a

written and signed stipulation.

Q That's your--didn't you admit earlier that that was your signature on that stipulation?

A That's correct, but that was not entered in this case.

Q It was entered--

A If I may explain. When we--I was in Court, we entered a stipulation on the record.

Q I understand.

A Mr. Ring prepared a stipulation, sent it to me, I made--I--the corrections--

Q Okay.

A --sent it back to Mr. King, and never heard of anything more, and apparently, Mr. King submitted the original--

Q Okay.

A --that he submitted to me to the Court, and the Court signed it and entered it.

Q Okay. Regardless of that, you signed the

stipulation; whether it was entered by--as a matter of record in the Court or not, you signed it; is that right?

A That's correct. There is a stipulation that I have signed.

Q And in there you do not--do you not admit that you committed fraud on this lady? Didn't you say the basis of that stipulation settlement was fraud?

A If that's stated on it, that's--that's--on the settlement that I

signed, then that's correct.

Q Okay. That--and you know the definition of fraud; you're an attorney, right?

A That's correct.

Q Okay. So, you've admitted that you defrauded this lady out of thousands of dollars, did you not, when you signed that stipulation? Regardless of whether it was entered into Court, you signed it; right?

A I signed the stipulation, yes.

Q All right. And you have no other documentation. You've known about this hearing, this--this was mailed to your home in Las Vegas; you do live in Las Vegas, don't you?

A No.

Q You don't live at 5233 Holbrook

Drive in Las Vegas, Nevada?

A No, sir.

Q So, if Mr. --oh, the attorney that you used to--

MR. WALLACE: Jamis-

MR. SMITH: Jamis, yeah, Jamis Johnson.

MR. WALLACE: Jamis Johnson.

Q (By Mr. Smith) If he indicated that that was your home of record, and that you told him that's where you lived, that was incorrect? Was he mistaken about that?

A No. I didn't tell Mr. Jamis that that was my home of record.

Q Okay. So, if he told the Bar that, then he was incorrect?

A Well, I don't know what he told the Bar.

Q Okay. And has he always known where you--where you could be located?

A Mr. Johnson knew that I was in Washington, D.C., and on many occasions, also in Western Samoa.

Q And he always had your address?

A Well, he knew I was at--that I could be reached in Washington, D.C. He called me there.

Q Okay. And your former testimony was that he forwarded documents to you from time to time that were sent--mailed to him; is that correct?

A No. No. The-

Q So that's not correct?

MR. WALLACE: Excuse me. I think he hadn't finished his answer.

MR. SMITH: Oh, I'm sorry.

MR. WALLACE: Let him finish his answer before you go to another question.

MR. SCHWENKE: No. My former testimony was that I didn't say Mr. Jamis forwarded anything to me; I said the secretary, when she receives any mail with Schwenke on it, she puts it in a box, and eventually she will put in an envelope and mail it to my ex-wife in Las Vegas.

Q (By Mr. Smith) I see. So, your testimony is that nobody knew where you were, including Mr. Jamison?

A Well, Mr. Jamis knew, and I believe the Bar knew that I was in Washington, D.C.

Q And how--how would the Bar know that? I think you said you never told the

Bar that; right?

A Well, the Bar contacted the Embassy-

Q And--and who-

A --and Samoan Embassy-

MR. WALLACE: You've got to let him finish his answer, Mr. Smith.

MR. SMITH: I'm sorry.

THE WITNESS: The--the Bar contacted the Embassy in Washington, D.C. and made some allegations that were partially false, partially true.

Q (By Mr. Smith) And who--who from the Bar made that contact?

A I--that, I air[not aware: the name as remembered by the secretary there, he just said to be--remembered the name of

Baldwin, but I don't recall exactly who he was referring to, or where--I-

Q Okay. But you did--just to go back and just to reiterate then. You did sign a document where you admitted that you had defrauded this lady out of at least $80,000; right?

A That document speaks for itself.

MR. SMITH: I have no other questions.

MR. WALLACE: Questions?

MR. TOBLER: No, I have no questions.

MS. WILKINS: I sort of wonder what (inaudible) money. You--the settlement with the insurance companies was $100,000?

MR. SCHWENKE: No. I believe the figure that's accurate is 82,000.

MS. WILKINS: Eighty-two, it (inaudible) So, how much money,

approximately, went into your trucking account?

MR. SCHWENKE: I would say at least 90 percent of all that money?

MS. WILKINS: Ninety percent; so some funds were paid to Mrs. Sur?

MR. SCHWENKE: That's correct.

MS. WILKINS: And that was approximately how much money?

MR. SCHWENKE: If my memory serves me correctly, probably 14, $15,000 direct.

MS. WILKINS: And some went to your personal account?

SCHWENKE: I--I received a check from our office for those months, for salary at that time, and I don't--my normal check from the office was between two and $3,000.

MS. WILKINS: So this was for your attorney fees for the Sur case?

MR. SCHWENKE: That's correct, and I--

MS. WILKINS: And that's all you were paid personally?

MR. SCHWENKE: Not necessarily for the--for the Sur case, this was what I received from our--from our law account during that time, not necessarily having to do with the Sur case, but in--in--every general, that's how much I was compensated for from the--from our law account.

MS. WILKINS: You mean for work done for the trucking company or for--

MR. SCHWENKE: No, no, for what I do for the law firm at that time, for (inaudible) association.

MS. WILKINS: ˜nd the money came out of

the

trucking account?

MR. SCHWENKE: And it's very likely that the check I will receive a month, two months, during that period of time would have come out of the settlement checks that were deposited in the Schwenke-Udall Account for the Sur.

MS. WILKINS: So, did you--were you ever paid your attorney's fee for the Sur case?

MR. SCHWENKE: Well, that's what I alluded to earlier in the way that lawyers should normally handle. We believe we--we got paid, but rather than specifically setting forth the amount of the attorney fees and then setting forth what attorney's fees was then put in-- wherever it went and

wherever the balance of the money went, unfortunately that was--unfortunately that was not done; and if that was done, I don't believe we'd even have any problems. But the totality of all the monies went in--most of it went to the trucking company, a lot of it went directly to Karyn Sur. Personally, I don't believe I received very much, probably--if I attributed two months, the checks for two months that I received from the office for that time, it would be--more than $5,000.

MS. WILKINS: Okay. Well, if 90% of the funds went into the trucking account, then how did you get $5,000 out of your own legal account?

MR. SCHWENKE: I--I don't think I'm

explaining this correctly. I'm saying the money went into the legal account no question, the money the settlement went in there.

MS. WILKINS: All of it?

MR. SCHWENKE: Yeah.

MR. WALLACE: About $83,000?

MR. SCHWENKE: Yeah, about $83,000. And from there, in the criminal case, we were able to trace where the money then go from there to the trucking company and also to the client as--as well, and--and that would show that most--that's where most of the money went.

I'm not saying that there was money directly from there to me, no; I'm saying that at the same time, those monies went into the--to the law account, there was

also--I was also being paid by the law firm, by the law account during those two months or so, and when that money was in that account.

And I'm saying that the monies that I was being paid for by the law--from the law account could very well have been from this--from this settlement money, but it doesn't have to be from this settlement money because there's other--other clients' money going--other fees going into that account as well.

MS. WILKINS: So you're indicating that that

money sat in your legal account for a couple of months at least?

MR. SCHWENKE: Well, it took a while to

finally all--went in to the--went in where it's--where it eventually ended up at, which was the trucking company.

MS. WILKINS: So, how long did the money stay in that account?

MR. SCHWENKE: I'm estimating a couple months.

MS. WILKINS: Two or three or four?

MR. SCHWENKE: Two, yeah, 'cause that, and I would be attributing the fees that I was getting from the law account to some of that funds that was in there.

MS. WILKINS: So, you're saying that you were only paid then $5,000 for the work on the Sur case?

MR. SCHWENKE: Please, I didn't I--I'm

not claiming that I got only 5-,000. I--I'm claiming--

MS. WILKINS: How much were you paid for the Sur case?

MR. SCHWENKE: --that the monies that I got paid for those months, which could very well be from the Sur case is approximately $5,000, $2,500 a month is what I was getting from the law account. And that could very well be from the Sur case; but specifically from the Sur case, no, I did not.

MS. WILKENS: So how did you earn your interest

in the trucking company?

MR. SCHWENKE: Through this settlement; by us helping them set up the trucking company, getting licenses and this type of

thing. Make those--those applications; plus part of our fees, supposed to be part of our fees in the settlement, that when all--went into there from the settlement, what was--is supposed to be our fee money-- excuse me--and some--and that earn-us our interest in the trucking company, and also our working in getting the trucking company going.

MS. WILKINS: What was your share of the trucking company?

MR. SCHWENKE: I believe it was 50%.

MS. WILKINS: Okay.

MR. WALLACE: Anything else?

MS. WILKINS: Nothing further.

MR. WALLACE: Anything else?

MR. TOBLER: I'd like to bring back Mrs. Sur and ask her a few more questions.

MR. WALLACE: Okay. I don't have anything else.

Do you have anything else you'd like to present at this time?

MR. SCHWENKE: I--I think I'm done, unless there's any questions.

MR. WALLACE: All right. Do you rest your case

on--

MR. SCHWENKE: I rest.

MR. WALLACE: All right.

Mr. Smith, do you have any rebuttal?

MR. SMITH: I don't know, yet. If I could have about one minute, I'll let you know.

MR. WALLACE: Fine. We'll wait.

MS. WAlKINS: Can I asked one question?

Let's see, you were--

MR. WALLACE: Are you going to ask it of Mr. Schwenke concerning the--let's wait until Mr. Smith comes back, unless it's just a--not a relevant question, has to do with just--

MS. WILKINS: I was reviewing--

MR. WALLACE: Whether to--

MS. WILKINS: This, not able to practice law--

MR. TOBLER: Suspended.

MR. WALLACE: Suspended.

MR. SCHWENKE: If I may add, when the Counsel returns, I just want to make one (inaudible) one before--

MR. SMITH: Okay. We'll put Mrs. Sur back on the stand just a moment, with your concurrence, and I believe also the panel

indicated they might have a desire to ask the witness some questions.

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KARYN SUR

recalled as a rebuttal witness by and on behalf of the Bar Council in this matter, after having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. SMITH:

Q And do you recognize that you're still under oath in this matter?

A Yes.

Q Mrs. Sur.

A Okay.

Q Going back to your earlier testimony and the earlier matters that transpired in this case, there was some

testimony to the effect that--that the respondent received some funds that you did not receive; do you recall that?

A Yes.

Q There was some testimony that those funds were placed--

MR. WALLACE: Let me just interrupt you just a minute. It's been called to my attention that Mrs. Sur may be recording these proceedings; is that appropriate, to your knowledge? I don't know one way or the other.

THE WITNESS: I'll just keep it for my own purposes.

MR. TOBLER: I'd prefer that not be the case; you probably--you may be able to get the tape recording of these proceedings, but

these are generally private proceedings that are recorded by the court clerk only.

MRS. SUR: Oh, okay. I'm sorry.

MR. SMITH: I actually don't know the answer to that, sir, whether that's permitted or not.

MR. WALLACE: I don't either.

Okay. Go ahead.

Q (By Mr. Smith) Did you know what the respondent did with those funds that he kept from your settlement?

A Yes. I discovered that he bought him and Bruce Udall a new car, one from Larry H. Miller, and one from another Miller's, there are several car companies called--last name Miller.

Q Don't know.

A Oh, I thought you knew, I'm sorry.

Yeah, what I know, one was from Larry H. Miller and then in a phone conversation, which I taped, I'd asked Schwenke straight out, if he put some of the money into Freight Distributors Trucking Company and he said yes.

Q What was the name of the trucking company?

A Freight Distributors.

Q Okay. So--so the respondent admitted to you that he put some money into a trucking company; right?

A My money, some of my money.

Q From the settlement of your personal injury case?

A Yes.

Q Do you know how much he put into

the trucking company?

A I don't. I didn't find out exactly how much.

Q Okay. And tell me about that trucking company; who owns that trucking company?

A Schwenke and Udall own 50 percent, and they took Warren Kennedy's semi and he had a contract for hauling air freight, he got 25 percent for that. My ex had a brokerage business with $50,000 equity in it, which means monies due him, and that was his part of it that was put in, and he got 25 percent.

Q So, the respondent owned 50% of a trucking company--

A Yes.

Q --that he used your money--

A Yes.

Q --to invest in?

A Yes.

MS. WILKINS: So, was it an ex-husband at the time, or--

WITNESS: No, he was my husband at the time, but I had nothing to do with his brokerage business.

Q (By Mr. Smith) So, did you get any benefit whatsoever from the--from this trucking company?

A No. As a matter of fact, I worked for it for three months and didn't get paid.

Q Did you author--did you authorize the respondent to put this money into the trucking company?

A N

Q And had you known about the money, would you have authorized him to put it in the trucking company?

A No. Especially with me not having any control.

MR. SMITH: Okay. I have no other questions.

MR. WALLACE: Do you have any questions?

MR. TOBLER: Yes.

MR. WALLACE: Go ahead.

MR. TOBLER: Was this arrangement with the trucking company the one where Mr. Schwenke and Mr. Udall owned 50%, was that established prior to your receiving, or prior to your settlement?

THE WITNESS: It was after my settlement.

MR. TOBLER: So, is it fair to say

that--I guess a better would be, would be, how did Mr. Schwenke and Mr. Udall get 50% in this trucking company, if you know?

How did they get 50% ownership? What was the consideration for that?

THE WITNESS: They--let's see, I've got the

paperwork here, let me get my glasses.

This shows where he put in his $58,000, now--not all of this is truthful, but this is Schwenke's letter on the trucking company.

MR. WALLACE: Do you want us to review this letter?

MR. SMITH: I don't know if I've seen it--

THE WITNESS: (Inaudible)

MR. WALLACE: Mr. Schwenke has a right to saw it also, before we look at it.

THE WITNESS: I've got computer printouts, even, from the trucking company--

(Inaudible)

MR. TOBLER: While I'm waiting to see that, I'll ask a couple of unrelated questions.

Did you have any discussion with or. Schwenke on him purchasing an interest in this trucking company?

THE WITNESS: No. My ex-husband talked to him about possibly putting two--Warren Kennedy and Ron together, because he (inaudible) the clients and whatnot I I never discussed it and I have no idea that any of my money was going into it, no.

MR. TOBLER: Okay. How much money, total, did you receive from Mr. Schwenke?

THE WITNESS: What Mr. King said, I got $250 a

for two years, I believe, September, I believe of '87, was the last one, did you keep that one I showed you (inaudible) the last money I'd gotten from the bank that shows it.

MR. TOBLER: I think we have been through this, but I'd like to know specifically.

THE WITNESS: I--

MR. TOBLER: In your--according to your knowledge, how much you received.

THE WITNESS: Exactly a total, I don't know. It was $250 a month from the time of

the settlement until 87.

MR. TOBLER: And I think your attorney stipulated that that was about $6,000; right? Two hundred and-

THE WITNESS: (Inaudible)

MR. TOBLER: Okay. What else, besides the $250 a month?

THE WITNESS: I got $5,000, in L.A., he sent me down there. I don't remember the $6,000, either, the statement was that I felt that I made--

MR. TOBLER: No. I don't know what his statement was, I just want to know how much money--

THE WITNESS: (Inaudible) he gave me the $6,000, it wasn't supposed to be part of my settlement, he would give me part of his settlement--

MR. TOBLER: Oh, an additional $6,000, in addition

to the amount that you received from the annuity?

THE WITNESS: The 5,000 and the 250 a month.

MR. TOBLER: Okay.

THE WITNESS: I thought that was all I was going to get, period.

MR. TOBLER: Okay.

THE WITNESS: And I was supposed to set the $250 a month for life, or by that--by benefactor got 20 years or something like that.

MR. TOBLER: And you discussed that with him, this annuity, proposed annuity?

THE WITNESS: Yeah.

MR. TOBLER: And did he--did he promise to purchase an annuity on your behalf with the monies that you had received from the settlement?

THE WITNESS: Yeah. And he paid me the $250 a month saying that the annuity was going to him in a special account for his clients, and I went to him to get my check every month.

MR. TOBLER: So, you were not aware that in fact no annuity had been purchased?

THE WITNESS: No. Not until '87, when I found out from my bank, that photocopy I gave you, showed that it came out of an account of his, some real estate company. And then I took it to Sam King, and I said, wait a minute,

here, you know, and we started investigating at that point.

MR. TOBLER: So, to your knowledge, that's all the monies you received is approximately $17,000?

THE WITNESS: Yeah.

MR. TOBLER: From Mr. Schwenke?

THE WITNESS: That I can (inaudible)

MR. TOBLER: And you were not privy to any conversation or--or any knowledge about investment of your funds into the trucking company?

THE WITNESS: None other than the phone conversation I had taped that (inaudible) I used it and had transcribed right--came right out and asked him if my money went into Freight Distributors, and he said yes, that it did, but there was no amount.

MR. TOBLER: And that was after the fact?

THE WITNESS: And that was after I discovered that there was no annuity, I went with him to the bank and he had a bond of $25,000 that was my money, as supposed to have been the money for the annuity, we went in to transfer it in my name, and that's when they said, I'm sorry, you defaulted on your loan, we've taken the money back, and I let out a holler, you can't, that's my money, and I guess the whole bank kind of heard me and he couldn't get it reserved, so the annuity money was gone, they took it 'cause of his default on the loan, so he couldn't pay me the 250 a

month any more.

MR. TOBLER: Other than I'd like a chance to 3 review that document, I don't think I have any more questions.

MR. WALLACE: Mr. Smith?

MR. SMITH: I forgot to ask you a couple of questions, if I might, unless you have another question.

Q (By Mr. Smith) Were you present at a--at a proceeding in a civil matter where these checks from Colonial Penn in the amount of $27,847.88 and $13,381.88 were discussed, a prior court proceeding?

A Oh, you mean in which-

Q Were these checks talked about, that you did not sign?

A Oh, yeah.

Q Do you remember that--do you remember that proceeding?

A The other court, and then another one, both of them.

Q Okay

A Civil.

Q All right. Were you there when the respondent was there?

A Paul?

Q Yes.

A Yeah.

Q Do you recall any admissions he may have made regarding those checks, and if so, what were those admissions?

A The admissions, where he admitted forging his name and where he spent the money, I got from the trial transcript, 'cause I was a witness and I had to stay outside during his testimony.

Q I--I see.

A But I read the transcripts that I bought of his testimony afterwards.

Q I see. So you--

A And I was sold by Marty Verhoff that he admitted it.

Q You were not personally present, but you--

MR. SCHWENKE: Object, your Honor. I mean the transcript is obviously what needs to be before the Court--before the panel here.

MR. WALLACE: Mr. Smith?

MR. SMITH: Well, I understand the transcript is the best evidence; however, I've given the respondent a lot of latitude to talk about documents that he hasn't produced, but I--I'll--

MR. WALLACE: Objection--objection sustained.

THE WITNESS: I 've got the transcript. I can go

pick it up and bring it in.

MR. WALLACE: Okay. Objection sustained.

4 MR. SMITH: I have no other questions.

5 MS. WILKINS: I wanted to ask, so you were hearing some discussions about the formation of a trucking company?

THE WITNESS: A little bit. My husband told me about it, that he was talking to Schwenke about putting him and Warren Kennedy together and starting a trucking company, that each one of them got

25% and Schwenke and Udall were to get the other 50, and--

MS. WILKINS: So where--what was your understand in about where your husband's interest would be coming from? Where was your husband earning an interest in the company? How was he going to obtain 25% interest in that company?

THE WITNESS: I don't know, 'cause all he got was a salary.

MS. WILKINS: And you didn't ever question about, how are you going to--to have 25--

THE WITNESS: I--I left that up--

MS. WILKINS: Did you know he was going to have 25% interest in the company?

THE WITNESS: He was--yeah. See, he would get 25% and Warren Kennedy would get

25% when they both put up

these different things, and that Bruce and Paul would have the 50%. And then--

MS. WILKINS: And what would--and what was your husband going to put up?

THE WITNESS: He had a truck brokerage business, Consolidated Transport, and he had $50,000 worth of receivables, people that owed him money, $50,000. He turned that assignment over to them, and I do have checks showing that, that's (inaudible) Master out of Idaho, potatoes, and different places, where they were made out to Consolidated Transport but were cashed by Schwenke and they kept the money.

MS. WILKINS: So that seemed like a reasonable investment on his part?

THE WITNESS: I was going on what my ex (inaudible) his part of it.

MR. WALLACE: Anything else?

Did I understand you to say that some or all of the $250 payments did not come out of the Schwenke-Udall account, but out of a real estate company account?

THE WITNESS: Yeah. It was (inaudible) It was out of a real estate business that he had with some other attorneys. I know I've got it here, I'll find it for you. And that made me question that, and then I got another copy of another check that they'd deposited in my account

and it was under another name. And those, I took to Jim Hawkes and he decided there was something going on.

MR. WALLACE: Did Consolidated Transport have a trucking license?

THE WITNESS: They were licensed as a trucking company, yeah.

MR. WALLACE: Did Freight Distribution make specific application for an additional license, or did they take over the license of Consolidated Transport?

THE WITNESS: Consolidated Transport didn't have a license I it was just a brokerage business my husband worked out of the basement. Now, if you've got a truck and I've got a load of potatoes, he calls you, he puts you in touch with me, he's kind of the middle man, just puts together the deal.

MR. WALLACE: Okay. Did you ever have a conversation with Mr. Schwenke in which he

told you something to the effect of, we have negotiated with Prudential to purchase an annuity, but now Prudential has come back and indicated that the costs are going to be much higher than we originally anticipated? Any conversation along that line that you recall?

THE WITNESS: No. He had me sign some papers from Prudential, or from an insurance company, that I signed and he said that was for my annuity, and it was an insurance,

if the annuity company went out of business that I was guaranteed my 250 a month.

MR. WALLACE: Okay. No--you don't recall any conversations about a different cost or an increased cost or we need to add something to what we thought we'd have to

pay?

THE WITNESS: Not until after I found out at the bank that he had put my money into a bond for himself and put a loan against it. It was all during this time that we discovered, but for two years, I thought it was coming from Prudential

MR. WALLACE: All right. And at the time you-did you see that bond, yourself, or did you just talk to the bank officers about it?

THE WITNESS: I was sitting there when the--the bank officer told him that they--they just took it-

MR. WALLACE: And the reason-

THE WITNESS: --because they defaulted on a loan.

MR. WALLACE: And the reason they took

it was the money was--the bond was in the name of A. Paul Schwenke as opposed to your name?

THE WITNESS: Right. He had mentioned going in there that he was going to put it in my name, that's why I went in with him.

MR. WALLACE: That's all-I have.

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Mr. Schwenke, do you have anything else to ask of this witness MR. SCHWENKE: Yeah. Jus. a couple of questions.

CROSS-EXAMINATION

BY MR. SCHWENKE

Q You--you completely deny being with your husband and Kennedy in my office several times prior to the settlement discussing the--

A Robert Kennedy wouldn't even sit

in the same room with me, Paul, you know that. He wouldn't even come out of (inaudible)

Q Please, just answer my question.

A No.

Q You completely deny ever being present--

A I was never in there with Ron and Karren and you talking about it, no. I might have been in there with Ron (inaudible) you were also the attorney for Consolidated Transport at the time.

Q And you deny sitting in with your husband and Kennedy and me and or. Udall in a meeting on--on starting this Freight Distributor business?

A I had nothing to do with starting it; that was all Ron and you and Warren.

Q Isn't it a fact that you and Ron and Kennedy ran the trucking business? You were there day in-day out?

A Warren was hardly ever there, 'cause he didn't Like my voice, he wouldn't stick around; yes, I did dispatch, but I worked for nothing to help you guys out, get started. Ron was supposed to do the figuring of the tariffs and that.

Q And the salary was collected by Ron, not you?

A Ron got the salary, I didn't get paid. I worked for meals, for lunch.

Q A salary was paid to Ron or you?

A To Ron. Ron got the salary.

Q Oh, there was salary paid then?

A Yeah. Ron got a salary.

Q Okay. - -

A But you didn't tive percentage when you closed the company out for about $196,000--$198,000. Out of the business, he didn't get his 25%, neither did Warren.

Q And the Prudential application that you just stated you signed; isn't it a fact that you signed that at the time that you also came and signed the release, when we talked to finalize the settlement, you signed the release at the--this was prior to us getting any of the funds?

A I don't know the exact date or whether it was the day before or the day after we got the money, because you knew how much.

Q Just if you remember.

A That's awfully hard to remember that far back, because it was either that day that I signed the paper, if we got the settlement first or after.

MR. SCHWENKE: I have no further questions.

THE WITNESS: I think I got the settlement first and then--and we signed the papers later. For the annuity.

MR. WALLACE: Anything else? You may step down.

THE WITNESS: (Inaudible)--tape recorder.

MR. WALLACE: Any other rebuttal?

MR. SMITH: No, sir.

MR. WALLACE: It's up to Mr. Smith. Oh, do you--did you offer the letter?

MR. SMITH: I don't desire to offer it

into evidence unless the respond--

MR. WALLACE: Pardon?

MR SMITH: --unless the respondent wants it in evidence or you want it.

MR. SCHWENKE: I'll offer it into evidence.

MRS. SUR: I--I have to change--

MR. WALLACE: Do you have any objection, Mr. Smith?

MRS. SUR: There's a couple deals in there he told tales about, about saying Ron's--he wasn't Ron's attorney at the time, which he was. And a few other

paragraphs, minor things, but basically, it doesn't explain the composition of the company.

MR. WALLACE: Mr. Smith, do you have

any objection?

MR. SMITH: No.

MR. WALLACE: Could we make copies of that at some appropriate point?

MR. SMITH: Just-

MR. WALLACE: Any other rebuttal, Mr. Smith?

MR. SMITH: No. I was just clarifying; the company is--was eventually liquidated; is that correct?

MRS. SUR: Yeah. Schwenke said there was no more money, close the doors while I had trucks all over the United States, and said I'm sorry.

MR. SMITH: And what--and who--the funds that were there, where did those funds go, as far as you know?

MRS. SUR: According to the computer

printouts that I got on Freight Distributors, there was like $198,000 pulled out of the company and no mention of where it went and he only paid the truck drivers and he didn't pay anybody else.

MR. SMITH: Did he pay or.--your ex-husband any money?

MRS. SUR: Not out of that, no.

MR. SMITH: So, of the $200,000 that there's no

accounting as to what Mr. Schwenke did with that after he liquidated the company?

MRS. SUR: No. Up to that point, the computer printout shows who got paid what and he got counselor fees and all the money--during the three months the truck company was working, where all the money

went; but as to that $198,000, he shows that was closed out, that's when the company was closed and that's what he pulled out of it.

MR. SMITH: Okay. No other questions.

MR. WALLACE: Okay. Mr. Schwenke?

MR. SCHWENKE: I don't have any further questions, but I'd like to--to, you know, to testify in rebuttal.

MR. WALLACE: All right. Any more rebuttal, Mr. Smith?

MR. SMITH: No, sir.

MR. WALLACE: All right. You can step down.

Thank you.

MRS. SUR: (Inaudible)

MR. WALLACE: Do you have any surrebuttal?

MR. SCHWENKE: Yeah, I do.

MR. WALLACE: All reheat. Do you want to go ahead? You're still under oath, Mr. Schwenke, so ahead and testify.

MR SCHWENKE: Okay. Thank you.

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A. PAUL SCHWENKE,

the respondent herein, after having been previously duly sworn, was examined and testified further as follows:

DIRECT TESTIMONY

MR. SCHWENKE: In response to some of the statements made here, the company was shut down due to the fact that we had more outstanding debts than the--the--let me back up. Mr. and Mrs. Sur were running and determining what a load was--what they charged for a load, and--and

sending out a truck to cover a load. And after month--the months, it seems like they kept coming back for more money to the trucking company, more money to the trucking company.

So, one Sunday, I went with a--an accountant that we used at the time, and he went through--to the warehouse where the company was operating, and went through all the books, and discovered that the--that it was costing substantially higher than the income that was generated to send these trucks out.

And then at that point when the decision was made collectively, with--between all of the principals to shut it down, and it was shut down. Efforts to made--subsequent to that, me and Udall also

kind of went apart also efforts were made to collect and pay as much as we could.

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We didn't pay as much--we didn't pay all of the debts outstanding at that point, but we covered pretty much most of the debts outstanding from what was--what could have been collected by both Mr. Udall and myself, to pay for the outstanding debt, and that was the end of the trucking company.

MR. WALLACE: Okay. Anything else?

MR. SCHWENKE: No.

MR.WALLACE: Mr. Smith, do you have any questions?

MR. SMITH: No, just one other comment, though.

I have asked Mrs. Sur to go obtain those documents and I'd like to offer those when

they're available. She just lives about ten minutes away, she says.

MR. WALLACE: Which documents are those?

MR. SMITH: Those are--it's a transcript that she referred to in her testimony wherein she alleges that the respondent admitted to forging of these--the forging of these documents, he's testi--although we have a default in this case where that has been defaulted, he here has admitted that he did not forged--he stated he has not forged those documents, and Mrs.--Mrs. Sur indicates that she has a transcript of a proceeding wherein the respondent admits the forgery, and so by way of rebuttal to that, I think it would be appropriate if I admit those into evidence

when

they're available

MR. WALLACE: Mr Schwenke?

MR. SCHWENKE: Well, although I would like to see the transcript myself, I think it's inappropriate to--to bring that transcript before this Court. I--I wasn't quite clear from the testimony where the transcript of criminal trial, and--

MR. WALLACE: Well, I've heard trans--I've heard transcripts of the criminal trial, and I've heard transcripts of a phone conversation she had with you, and I don't know which of those that she's bringing. Do you know, Mr. Smith?

MR. SMITH: She--she indicated that it was the Court record that she was bringing.

MR. WALLACE: A criminal trial record, a portion of the criminal trial record?

MR. SMITH: I don't know until I see it.

MR. SCHWENKE: Again--

MR. WALLACE: Well, maybe we--

MR. SCHWENKE: This--there was no civil trial. So there's no transcript there. The only transcript that I'm aware of is this transcript of the criminal trial, and I know for a fact there was no such admission in the criminal trial, otherwise, I would have been convicted;
however, I think for purposes of your decision today, I

don't think you do need to look at that. So, on that--

MR. WALLACE: Let--okay, let's--have you--let's-- and I won't rule on that at this time. Let's go ahead and proceed, you've both been given opportunities for a case in chief and rebuttal. At this time, Mr. Smith, we would ask, you have the burden, ask you to go forward in arguing the case, what your recommendations would be and what you think we ought to do, and then we'll have Mr. Schwenke reply to that--respond to that.

If she gets back here with the records, we may take that up and decide whether or not to receive those also.

MR. SMITH: All right. Just once again point out to the Court that we do have a default in this case and that the matters set forth in the formal complaint have been

established as true, and the only matters that I've offered today have been by way of indicating the aggravation to substantiate our claim, which is that the respondent should be disbarred.

And I submit, members of the panel, that if ever a case warranted disbarment, this one does; and if this one doesn't, I--it would be hard to imagine one that doesn't require disbarment.

That we have here an individual who has forged a client's signature to checks, and has stolen money from his client and has cheated her out of thousands of dollars by

settling her case in the manner it was settled. And you've heard the aggravation in that she's testified that she has been

substantially and permanently disabled. That she is suffering these injuries that she cannot get corrected because of her inability to pay for that. That she is now, for the rest of her life, going to have to endure the consequence of the malfeasance of his respondent because of her permanent and physical disabilities, disabilities that she doesn't have the money to correct, disabilities that she could have gotten corrected if she'd had the money that was due her.

That the facts are established that she could have gotten $200,000 had this case been handled correctly, total settlement of which approximately 150,000 would have been hers, and with that much money, she could have been able to go and set the medical

care and treatment that she needed and because of this--of the malfeasance of the respondent, she has suffered that, and is going to suffer substantial permanent injury the rest of her life.

So we heard that--we heard evidence that the respondent admitted that he owes her an additional sum of money, I believe, if memory serves me correctly, that's bearing the respondent's own signature, wherein he states, I owe you this money and I owe you this money because of fraud, because I defrauded you, and he's admitted that he's

defrauded her and therefore owes her that much money.

So, we have the element of fraud, we

have the element of larceny, we have--and we have permanent and serious injuries on the part of this individual who was harmed by this person. We've heard that he took the money that he got, put it into his own business, that he subsequently litigated--liquidated and--and we--although we don't know where that went, we know that it didn't go back to Mr. Sur, and so once again, the respondent has benefitted by his own malfeasance, financially.

And ladies and gentlemen, I'd just simply submit that this case leads to only one conclusion and that is disbarment, and give you the--the standings for imposing lawyer sanctions which you can use as a guide in making your own conclusions, but I submit--(Tape change - some proceedings not

recorded.)

MR. WALLACE: --the insurance companies were willing to settle for $200,000 and in that regard, I'll ask two or three questions and just let you respond.

I'm--I'm--pretty much in my own mind set, but I imagine there are a lot of cases where an insurance company has a case reserved for a certain amount of money and would be willing to pay out a certain amount of money and then settle it for half of that value because of the actions of a attorney. Let's assume an attorney isn't the best personal

injury lawyer and doesn't prosecute a case well and maybe settles a case for 50% of what another attorney may be able to settle a case for. You don't believe that that violates the rules of discipline of the Bar, do you?

MR. SMITH: Because they have--they have a difference in judgment?

MR. WALLACE: Yes.

MR. SMITH: No. I don't. But I don't think that's the evidence in this case. The evidence in this case is, that's established by the default, is that this case, that the insurance companies prepared to settle this for their policy limits of $100,000, and that they--that

they responded, in his eagerness to settle this case and grab what he could, didn't

pursue that settlement, although they were willing to do that.

MR. WALLACE: But there's no evidence that he knew they were willing to do that. This is something that's come to light after the fact that the case was reserved for a higher amount, or that there may be more monies available, and that had he been a better lawyer or worked harder, or pushed harder--

MR. SMITH: No.

MR. WALLACE: --he may have gotten more money for his client.

MR. SMITH: No. I think the allegation is that

he knew that, that's--at least that's what's changed in the formal complaint and that was

what he--that the knowledge was there.

MR. WALLACE: All right. Okay. Let's look at that a moment, 'cause I think--this is one issue I'd like to resolve.

My understanding is there's an allegation that the company was aware--the companies were ready to pay $200,000 but not that he necessarily knew that was the case.

MR. SMITH: Well. let's see.

MR. WALLACE: Paragraph 7.

Oh, Paragraph 11 is the one I'm thinking of. Documents submitted in the Third District Court indicate that both insurers were going to pay their entire limits totaling $200,000 due to the severe disabling injury by the plaintiff, et cetera. I don't think there's an indication that he was aware of that prior to the

settlement.

MR. SMITH: Other than if you look in--in Paragraph 29, the fee he took was actually equivalent to 20 that, which-

MR. WALLACE: Right. I did notice that.

MR. SMITH: --which means that he must have had some idea of how much his fee would have been, so I submit that he knew.

MR. WALLACE: Okay.

MR. SMITH: And that he stipulated to that judgment based upon his knowledge of what the case wheeze worth.

MR. WALLACE: All right. Mr. Schwenke, your response?

MR. SCHWENKE: I think the--with respect to the statement, the argument just